No. 603

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1927.

L. P. LARSON JR. COMPANY,
Petitioner,

vs.

WM. WRIGLEY JR. COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT and also TO AMEND THE ORIGINAL DECREE IN SAID CAUSE ENTERED OCTOBER 14, 1918, SO AS TO AWARD THE DEFENDANT AND COUNTERCLAIMANT THE GROSS PROFITS WITHOUT DEDUCTIONS FOR EXPENSES.

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BARNARD & MILLER PRINT, CHICAGO

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FOREWORD.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

In the several petitions for the *writ of certiorari* which I have heretofore had the honor to submit to the consideration of this court, there has been in each case, as I recall, but a single ground of attack or challenge of the action of the court below, as not in conformity with the decisions of this court. I was able to conform to a reasonable degree, as I hope, to your rule to observe the studied accuracy, brevity and clearness essential to the ready and adequate understanding of the points upon which I relied to sustain the right of my client to the relief sought.

In the present application there are, not one, but I believe seven different and independent grounds for challenging the conclusions of the Circuit Court of Appeals, and as a result, despite all efforts to attain brevity, the papers are of greater length than I had hoped. I do not feel that I can shorten them, except at the risk of clearness, and hence submit them with this explanation. I have prepared a summary, or index, which states these several grounds upon which, it is insisted, the opinion is in conflict with the law as heretofore announced in this court, with page references to the Brief and Argument in support thereof, and in which proper references are made to the record. There are certain exhibits attached to the petition for the convenience of the court, as the printed record is very long. I trust the court will not feel, when it inspects the number and character of the questions presented for your determination, that I have not earnestly sought to observe the rules prescribed to facilitate your labors.

Respectfully submitted,

CHARLES H. ALDRICH,
Solicitor and of Counsel for Petitioner.

SUMMARY OF POINTS UPON WHICH THIS APPLICATION FOR WRIT IS BASED WITH REFERENCES TO BRIEF (CITING CASES) AND ARGUMENT COMMENTING UPON FACTS WITH REFERENCES TO THE RECORD.

I.

The *writ of certiorari* is sought because the decree under which the accounting was had prescribed the rule that the Master "should ascertain the profits, if any, accruing to said company from the sale of Doublemint, as contradisguished from the other brands of gum made by said company during the period, making proportionate deductions for overhead, advertising and other proper expenses."

This rule was wholly disregarded by the District Court and the Court of Appeals.

The Wrigley Company had never kept any account with the several brands of gum manufactured by it.

It was agreed that Doublemint cost the same to manufacture as the Spearmint and Juicy Fruit, the other chief gums manufactured and sold by the Wrigley Company, was sold through the same agencies, at the same price, subject to the same discounts and terms of sale as the other gums. (Master's Report VII, 3207.) Obviously, therefore, when the total costs, sales and receipts were ascertained of all gums, and of Doublemint, the gross profits on Doublemint were ascertained, and the application of the Doublemint proportion of these sales to the sales of other gums to the total expenses, as show by the books, would give the credits to which the Wrigley Company would be entitled under the direction of the decree. This would be a concise and simple matter. We have the testimony of the chief witness of the Wrigley Company and the witness who later attempted to deceive the courts by false and misleading statements, that this rule of adjusting such expenses on the proportionate basis is good accounting practice.

The allowances made by the District Court, and affirmed by the Circuit Court of Appeals, in the advertising account, contingent liability for United Profit Sharing coupons, tabulated page 16 of this petition, are in total disregard of the terms of the decree, and therefore amount to gifts to the Wrigley Company without jurisdiction.

We insist that neither the District Court, nor the Court of Appeals could vary this accounting or its methods or extent, while the decree remained unchanged.

The action of the Master was practically, as he states, in accord with these contentions. (VII, 3210.)

That all the power and jurisdiction exercised by these courts must be within the terms of the decree and authorized thereby, is established by the decisions cited in Number I of the brief filed herewith, page 15, and it is submitted that this departure requires the corrective action of this court, both in the public interest and that of uniformity of decision. It is neither in the interest of public morals nor in accord with the decisions of this court that subordinate tribunals should in defiance of the warrant under which they act make large allowances to a wrong doer, strongly condemned as a forestaller, willful aggressor, guilty of deceiving the courts, filing bills supported by a false oath, knowingly made, etc. (VII, 3115, 3116) nor are such allowances warranted by the decisions in equity.

II.

The statement of Mr. Stanley (II, 758) that the division of expenses on the proportionate basis prescribed by the decree heretofore referred to is good accounting practice, is a method often applied in this court.

The authorities cited in II of our Brief, p. 16 are in

conflict with the allowances of the District Court and the Circuit Court of Appeals, and furnish an additional reason why in the interest of uniformity of decision the writ should be allowed.

It is suggested that if the Wrigley Company had any *good* reason to think that the proportionate rule prescribed by the decree would result in making its credits against the gross profits too small, that it should have applied to the proper court to modify the decree. A few sentences of Mr. Stanley's testimony quoted in our supporting brief show why the defendant adopted this course.

Brief and Argument, p. 41.

III.

In this division of our Brief and Argument we submit that the Master's findings depending upon conflicting testimony and the credibility of witnesses, or so far as there is any testimony consistent with the Master's findings, must be treated in the District Court as unassailable.

This proposition has been stated specifically by this court, and in other cases here cited language equivalent to this has been used, as when such a finding has been compared to the verdict of a jury, not to be disturbed except for reasons as strong as would justify the setting aside of a verdict. The only exception to this rule relates to cases involving constitutional questions and questions of public policy.

The District Court violated this rule in every change it made in the Master's report, and the Circuit Court of Appeals did likewise in affirming each such change made by the District Court, and likewise in the changes made by it. This again calls for the issue of the writ in the interest of uniformity of decision.

Brief and Argument, pp. 10, 25, 26, 31, inclusive, also 36-41.

IV.

The books of the Wrigley Company were so kept that there could be no separation of the United Profit Sharing coupons issued during the acounting period and those issued after the end thereof. Both the redemptions and the contingent liability for those unredeemed must be calculated upon the totals and without regard to their date of issue. During the accounting period these coupons were used with the three brands, Spearmint, Juicy Fruit and Doublemint. After the expiration of the accounting period they were used with three other brands of gum made and sold by the Wrigley Company, making six in all. And during a part of the later period the number of coupons issued with each box sold was increased. The proof showed that based upon the Wrigley experience to the date of the close of the evidence in this case the allowance of 33⅓%, or $98,580.79 on account of Doublemint's share of contingent liability for unredeemed United Profit Sharing coupons, as made by the Master, would not be reached for over forty-five years. This allowance was far beyond Doublemint's proportion based on Doublemint's sales or profits as prescribed by the decree. And yet, the District Court added to this sum the further one of $64,715.60 as its guess based upon the experience of others in other lines of business, and to this the Circuit Court of Appeals has added the further sum of $86,358.64 on the same basis.

The Larson Company is in no position to object to the allowance made by the Master, as it filed no exceptions to his report. Had it taken exceptions thereto it is submitted that no allowance for redeemed or unredeemed coupons could have been made. It has and does object to these additions made by the District Court and the Circuit Court of

Appeals, and submits to the court that such additions are in direct conflict with the terms of the decree as well as the principles well established with respect to the subject of confusion as stated by this court.

Brief and Argument, pp. 17 and 18, 31 to 36.

V.

The decisions of the Court of Appeals in this case, 253 Fed. 914, 275 Fed. 535, and the decision here sought to be reviewed on the accounting part thereof have established the fact that the Wrigley Company in both its attacks upon the Larson Company through the courts was a willful trespasser and forestaller, actuated by a desire to keep the Larson Company small, to clip its wings, limit its trade, etc.; that in the prosecution of these ends it has been guilty of deceiving the court, using bills supported by false oaths knowingly made, etc., and that because of such conduct it must be treated as Larson's agent, selling Larson's gum, and as such liable to account to Larson for all Doublemint gum, wherever sold. This is only applying old and well established principles as *agent de son tort,* or constructive trustee, to the relations of the Wrigley Company towards the Larson Company.

The Master awarded interest on the award at the rate of six per cent. per annum from the end of the accounting period, November 12, 1918, to the date of the entry of the decree. This was changed by the District Court to the date of the Master's report, November 13, 1923, thus deducting from the Master's finding five years' interest.

If an honest trustee or agent by appointment would be charged with interest upon accounting with his principal from the date when he should have paid, it surely cannot be the law that an agent or trustee of the adjudicated character of the Wrigley Company in this cause should be exonerated from such payment.

We have in our Brief and Argument, pp. 18, 19, 45-49, cited the authorities showing that the exception of bad conduct, willful trespass on the part of the defendant, constitutes an exception to the purely artificial rule that ordinarily interest upon unliquidated demands only runs from the date of the Master's report.

We submit that these cases show clearly that this distinction has been fully realized and established by decisions of this court, and no such anachronism exists as that shown by this decision, and we therefore seek its correction both on grounds of public policy and in the interest of uniformity of decision.

VI.

The Master and the District Court both disallowed the claim of the Wrigley Company that it should have credit for Doublemint's share of the income and excess profits taxes paid by it during the accounting period.

The Circuit Court of Appeals reached a different conclusion and allowed on this account as a credit to the Wrigley Company the sum of $888,276.52, or over $500,000 more than the Wrigley Company claimed in its filed account.

We have filed as an exhibit to our petition herein, for the convenience of the court, a report of Messrs. Touche, Niven & Co., public accountants, to the writer, showing the results of this allowance in the inequalities of tax burdens resting upon the Wrigley Company and the Larson Company, respectively.

The court will observe that Larson Company never received any part of this money, and the constructive receipt imagined by the court for the purpose of working out this wholly novel and hitherto unheard of method deprives the Larson Company of the rights given by the statute referred

to (Sec. 327 and 328); nor has the Wrigley Company ever acquiesced in the decree rendered against it. As shown in our Brief and Argument, pp. 19, 20, 48-54, the statutes, regulations and decisions in the department require recognition of liability, by writing off the amount thereof, whereupon the Wrigley Company has credit to the amount adjudicated against it in its next year's taxes; while the Larson Company under the law would return the amount received from such payment in the years received, and pay taxes thereon to the United States. The law has never recognized any of the vicarious methods of receipt, payment, acquiescence, etc., created by the court.

It is submitted that in the public interest in the administration of these laws, and also of public morals, and also of uniformity of decision, this court should correct this extraordinary action by the court in favor of a wrong doer of such character.

Such decision is in hopeless conflict with this same court's action in *Jackson* v. *Smietanka,* 272 Fed. 970 (C. C. A. 7th), cited in our brief.

Brief, p. 13.

VII.

The Wrigley Company, after its Doublemint bill filed June 15, 1915, had been answered and a counterclaim filed by the Larson Company, transferred its factory in Canada and all its property of every kind there located, including trade-marks, trade names, trade dresses, etc., to a Canadian corporation, taking in payment therefor $500,000 par value, preferred stock, and $2,000,000 par value common stock. The common stock was distributed as a stock dividend to the defendant's shareholders on the basis of five shares of the Canadian company to each share of the Wrigley Company stock owned.

The Canadian Company was controlled by the Wrigley Company and its shareholders.

The shareholders and officers of the two companies are shown in the record (X, 4095-4097).

The Canadian Company continued the use of the infringing dress until October 19, 1921.

Upon motion by the Larson Company the Master extended the accounting by the Wrigley Company to include the profits, if any, made by the Canadian company. It was not sought to make the Canadian company liable, but to hold the Wrigley Company, defendant to the Larson Company's counterclaim, liable. This motion had led primarily to the decision of the Circuit Court of Appeals reported 275 Fed. 535, and which had held in accord with the contention of the Larson Company.

It is our contention, for the purposes of this motion, that neither the District Court nor the Circuit Court of Appeals had any right or jurisdiction to hold otherwise after that decision, and such action by them raises questions which require that the writ prayed for issue herein.

We cite some of the cases decided by this court sustaining our contention in this respect.

Brief and Argument, pp. 20, 21, 22, 23.

We file herewith quotations from the petition for a rehearing filed by counsel for the Wrigley Company in the case decided in 275 Fed. 535, marked Exhibit W, and submit that counsel are not permitted now to assert the contrary of that for which they then contended.

The cases so holding are cited, Brief and Argument, 21-23.

IN THE

SUPREME COURT OF THE UNITED STATES.

L. P. Larson Jr. Company

vs.

Wm. Wrigley Jr. Company.

PETITION FOR THE WRIT OF CERTIORARI.

The L. P. Larson Jr. Company, a corporation organized under the laws of the State of Illinois and a resident of said state, doing business in the City of Chicago, represents to the court that on the seventh day of October, 1911, the Wm. Wrigley Jr. Company, a corporation organized under the laws of West Virginia and having its principal office and place of business in the City of Chicago, State of Illinois, filed its bill in the then Circuit Court of the United States against this petitioner, charging that a certain brand of gum manufactured and sold by your petitioner throughout the United States known as *Peptomint* gum infringed in its color scheme, or trade dress, the color scheme or trade dress of a certain brand of gum known as Spearmint gum manufactured and sold by it, the Wrigley Company; and later, to-wit: on June 15, 1915, the said Wrigley Company filed its second bill against your petitioner in the District Court of the United States for the Northern District of Illinois, Eastern Division, claiming that another brand of gum brought out by your petitioner in December, 1913, known as *Wintermint* infringed in its color scheme or trade dress the color scheme or trade dress of two brands manufactured and sold by the Wrigley Company, viz.: its Spearmint and its Doublemint brands.

Both these suits were brought to hearing in the District Court of the United States for the Northern District of Illinois, Eastern Division, having been consolidated and heard together by order of court, duly entered, and both of said bills filed by the Wrigley Company were on hearing before the said District Court of the United States, dismissed by said court for want of equity, as was also the counterclaim of this petitioner filed in the later case brought by the Wrigley Company. Thereupon, both parties to said consolidated cause prayed for and were allowed and completed appeals in said cause to the Circuit Court of Appeals of the United States, Seventh Circuit, where the action of the District Court in dismissing for want of equity the two bills of the Wrigley Company was affirmed, and its action in dismissing the counterclaim of the Larson Company was reversed and said cause remanded, with directions to enter an injunction and order an accounting which was done. (253 Fed. 914.)

The Wm. Wrigley Jr. Company thereupon prosecuted its petition for the *writ of certiorari* to this court to reverse this decree, which was denied. (248 U. S. 580.)

A copy of the decree so entered is attached hereto and made a part hereof, marked Exhibit A.

Upon the accounting so ordered the contention was made in behalf of the Wrigley Company that it was required to account only in territory where the Larson Company had established its trade in Wintermint gum, and that it was therefore entitled to examine the Larson books and officers to ascertain the extent of such trade; while in behalf of the Larson Company it was contended that the Wrigley Company had entered upon its sale of Doublemint gum with full knowledge of the prior use by the Larson Company of the dress of which it complained in the bill filed June 15, 1915, with the purpose of forestalling the Larson Company,

and had wantonly and wilfully sought to injure the Larson Company in filing such bill, and that it was liable under the decree entered and the opinion of the Court of Appeals for all profits to it accruing from the manufacture and sale of its Doublemint gum in its infringing dress during the accounting period, as defined in the decree. The Master, without deciding the question thus mooted, ruled that such evidence should be taken, and a large amount of such evidence was received, until it became clear that the purpose of the Wrigley Company was to delay the proceedings, and it was declared by the officers and attorneys of the Wrigley Company that it would ruin the Larson Company and injure the personal reputation of its president, L. P. Larson, Jr., if he proceeded to prosecute the said counterclaim of the Larson Company (VII, 3073); whereupon the Master was advised that no further evidence would be given or information furnished from the books of the Larson Company under the advice of counsel, and the Master was asked to certify the questions to the District Court, which was done; the District Court directed that the question should be answered. From this action of the District Court the Larson Company both appealed and also sought mandamus against the District Judge, which was allowed, directing him to show cause why he should not obey the mandate of the Circuit Court of Appeals as directed in the original opinion of that court of July 30, 1918. (253 Fed. 914.) The appeal and mandamus cases were heard together and resulted in the reversal of the action of the District Court in ordering the examination of the Larson Company books and of L. P. Larson, Jr., to proceed, and as the District Court had professed itself uncertain as to the meaning of the Court of Appeals in its former opinion, the latter court took great pains to remove all doubts as to its meaning. This opinion is found in 275 Fed. 535.

The accounting by the Wrigley Company, which had been delayed by this unwarranted attempt to examine into the business of the Larson Company from April 17, 1919 to March 31, 1921, the date of this opinion, was again resumed, and finally concluded on June 11, 1923.

The Master found that the Wrigley Company had made gross profits of $5,152,689.32 in the manufacture and sale of Doublemint in its infringing dress during the accounting period. (VII, 3207.) These figures are agreed upon by all parties, as well as the accountants representing both parties. The Master fixed net profits during the same period of $2,860,083.66. (VII, 3230.)

The District Court upon objections and exceptions in behalf of the Wrigley Company decreased the amount found by the Master by deducting therefrom the total sum of $1,475,434.18, and entered a decree in favor of the Larson Company for $1,384,649.48. Both parties appealed from this decree and the Circuit Court of Appeals has affirmed the action of the District Court in all the deductions by it made, and itself made further deductions so that the finding and recommendations of the Master that the court render a decree for the sum of $2,860,083.66 under the decision complained of and to correct which this writ is sought, will result only in a decree of approximately $410,014.32; or, applying the principle that losses in one year cannot be deducted from profits of another year, the awardable profits under the decision of the Court of Appeals, against which this petition is directed, will be $801,938.62.

This result was reached by the Circuit Court of Appeals only through a manifest disregard of the directions of the decree under which the accounting was had and without any attempt to modify or change the decree so disregarded. It was also reached in utter disregard of the character as a litigant of the Wrigley Company as determined by the three

opinions of the Circuit Court of Appeals, which we have cited as well as that of the District Court in its review of the Master's report (5 F. (2d) 736), and in disregard of the evidence before the Master depending upon the credibility of witnesses which compelled the Master to the different conclusions announced in his report.

This character of the Wrigley Company so established by these decisions will not be questioned here for the purposes of this application, as we assume. When the writ is granted, we undertake to establish beyond controversy (if counsel claim any injustice has been done the Wrigley Company) that such bad character has been well earned, and that the literature of the law in civil actions does not afford any example of such brazen attempts to prostitute the processes of the courts to base purposes.

We make this assumption and statement upon the authority of

Texas & Pacific Railway v. *Railroad Commission of Louisiana*, 232 U. S. 338.

Washington Securities Company v. *United States*, 234 U. S. 76, 78.

Chicago Junction Railway Co. v. *King*, 222 U. S. 224.

The deductions or credits allowed the Wrigley Company in contravention of the findings of the Master by the District Court, all of which are affirmed by the Circuit Court of Appeals in the opinion here sought to be reviewed, are as follows: each of these deductions was and is in violation of the prior decisions of this court in respects pointed out in the summary attached to the petition and upon the authorities cited in the brief:

1. Advertising	$1,057,407.52
2. Profit Sharing Coupons	64,715.60
3. Interest on Capital Invested in Tangible Assets	259,120.54
4. Interest on Capital invested in Patent Rights	45,260.79
5. Miscellaneous Income (there were other small items which in the interest of brevity we do not tabulate but do not waive)	45,703.01

To the above the Circuit Court of Appeals has allowed the following additional credits to the Wrigley Company:

6. Additional allowance for unredeemed United States Profit Sharing Coupons	86,358.64
7. Deductions on account of Federal Income and Excess Profits Taxes	682,500.92

8. In addition the Master allowed interest at the rate of 6% per annum on the award from the end of the accounting period to the date of the decree. The District Court changed the date from the end of the accounting period, November 12, 1918, to the date of the Master's report, November 13, 1923. This is affirmed by the Circuit Court of Appeals in the opinion sought to be reviewed, except that it reduces the rate of interest allowed the Larson Company from 6% to 5%.

9. The Master held that the Wrigley Company was liable for the infringement by the Canadian Company, formed after this case was at issue and owned and controlled by it, and which continued the use of the infringing dress until October 19, 1921. The Master understood that counsel for the Wrigley Company had agreed that a separate report might be made on the Canadian Company branch of the matter, when at the instance of the Wrigley Company counsel he made the fifth extension of time within which the accountants' report of the profits made by the Canadian Company might be filed. This was afterwards repudiated

by counsel and both the District Court and the Court of Appeals have now held that the Wrigley Company was at liberty to bring its suit against the Larson Company for alleged infringement of its Spearmint and Doublemint dress by the Larson Wintermint dress, and after the Larson Company had filed its answer and counterclaim and said counter claim had been put at issue in the suit showing its priority to the Wrigley package to convey to a new corporation the Canadian properties, distribute its capital stock received in payment therefor as a dividend to its own shareholders, continue its control of the properties and the infringement to the date named, and yet escape all liability for this infringement, and without regard to its own prior opinion as reported in 275 Fed. 535, and in which the right to the recovery of the Canadian profits against the Wrigley defendant company was adjudicated.

The decree entered in said controversy following the opinion of the Circuit Court of Appeals as reported in 253 Fed. 914, directed the Master to whom the cause was referred "to ascertain the profits, if any, accruing to said company from the sale of Doublemint as contradistinguished from the other brands of gum made by said company during the period, making proportionate deductions for overhead, advertising and other proper expenses, and report the facts for each year embraced in the terms of the decree."

The period of infringement extended from July 28, 1914, to November 12, 1918. The Master determined the proportion of Doublemint sales as contradistinguished from the sales of other brands of gum manufactured and sold by the Wrigley Company during the infringement period as follaws (VII, 3207):

> "The Wrigley Company carried on its business as an entirety and its books were not kept with a view to show separately the sales and the cost of manufacture of the various brands handled. All gum produced by

the company was made in the same factories and composed of the same elements, the only difference being in flavor, name and dress of the different brands, and it is conceded that the cost of the different brands is the same.

The sales of the various brands are capable of separation by an examination of the invoices. The sales of Doublemint as thus ascertained together with the total sales and the percentages of Doublemint sales to total sales are here shown by years:

	Total Sales	Doublemint Sales	Percentage of Doublemint to Total Sales
7/28/14 to 1/31/15	$ 3,522,732.30	$ 570,426.40	16.1927
1915	9,717,145.33	1,816,332.08	18.692
1916	12,482,342.87	2,049,964.85	16.4229
1917	15,713,657.84	2,348,003.49	14.9424
1/1 to 11/12/18	15,214,994.80	2,132,560.08*	14.016
	$56,650,873.14	$8,917,286.90	15.74

*The sales of Doublemint in the United States from October 5th to November 12th, inclusive, are not included, as the infringing dress was discarded in this country at October 4, 1918.

The sales of Doublemint throughout the accounting period, $8,917,286.90, the manufacturing cost thereof, $3,764,597.58, were accepted by the Larson Company as correct."

There was no investigation of the cost of manufacture of the several brands of gums made and sold by the Wrigley Company. It was agreed upon the record that the several brands cost the same to manufacture, were sold at the same price, upon the same terms of payment, through the same agents, subject to the same discounts, etc. There is, as the Master states, no controversy as to the total sales of Doublemint and the cost of manufacture, or that the gross profits thereon was $5,152,689.32.

Applying the rule of the decree "proportionate deductions for overhead, advertising and other proper expenses" it would have been easy to take the ratio, or proportion, of

Doublemint business to the other gum business done by the Wrigley Company as found by the Master for each of the periods of the infringement, and ascertain the amount of the credit of the Wrigley Company as against these gross profits; disregarding the provision of the decree, and without seeking any change therein, it was contended by the Wrigley Company that it was at liberty to build up an account not shown by its books. Its own expert, who had testified that the proportionate rule was good accounting practice (II, 758), with the hope to escape this rule, which is well recognized and has been often applied in the courts, and which would have established the Larson Company's right to a recovery against the Wrigley Company, submitted to the Master its account purporting to show a loss on the Doublemint business for the accounting period, of $286,238.30, and later submitted a purported account of Ernest Rackett & Co., purporting to show a total loss on the Doublemint business of $691,560.76. (VII, 2306.)

We have, in our brief filed herewith in support of this petition, stated that this account as filed was sought to be supported by statements prepared by this witness with the intention of deceiving the Master and the courts, which were not only in disregard of the terms of the decree but were known to be false.

It is here contended that neither the Master, the District Court nor the Circuit Court of Appeals itself, was at liberty after the entry of the decree from which we have quoted, to disregard its provisions. We cite the authorities in our brief filed herewith, and also the authorities showing that the rule prescribed by the decree has been often applied in this and other Federal courts.

And we make the summary of the points upon which we rely a part of this petition as showing wherein the errors of allowing the several credits to the Wrigley Company

are to be found, and in the hope that it will be accepted by the court as a compliance with its rule as to brevity and clearness.

The action of the District Court and of the Circuit Court of Appeals in the opinion here sought to be reviewed is in irreconcilable conflict with these decisions, and in the interest of uniformity of decision and of public policy the allowance of the several credits to the Wrigley Company hereinbefore referred to should be set aside as not authorized under the terms of the decree.

III.

And petitioner further avers that the Master to whom said cause was referred found that the said Wrigley Company made a net profit on the manufacture and sale of Doublemint gum during the accounting period of $2,860,-083.66, and was entitled to recover said sum, together with interest thereon, from the end of the accounting period, to-wit: November 12, 1918, to the date of the entry of the decree at the rate of six per cent. interest per annum. That upon objections and exceptions filed to the said Master's report in behalf of the Wrigley Company, the District Court reduced the Master's findings in the respect set out in the brief filed herewith supporting this petition, to $1,384,-649.48, with interest only from the date of the Master's report instead of the end of the accounting period, and which changes by the District Court have all been affirmed by the Circuit Court of Appeals in the opinion of said court here sought to be reviewed, which court has also made further and additional deductions from the decree made by the Master in the respect stated in the brief, and all and each of which changes and deductions made by the District Court and also the Circuit Court of Appeals are made

not only in violation of and disregard of the terms of the decree as entered, but also in violation of the rule often announced by this court that the finding of the Master, upon controverted facts, who saw the witnesses, and had an opportunity to judge of their credibility, and where there was evidence consistent with the finding of the Master, must be treated as unassailable in the absence of obvious errors of law.

We have shown in our supporting brief that the Master was sustained by the evidence in each and all his conclusions; that clear and positive attempts to deceive him were made as to these controverted facts, and that the deductions made in the District Court and affirmed by the Circuit Court of Appeals in the last opinion of said court, as well as in the further deductions made by that court, there has been no attempt made by either court to show wherein the Master was mistaken or had overlooked any legal proposition which should have changed his conclusions; in short, each and every change made by the District Court and Circuit Court of Appeals is made in disregard of the rules heretofore announced in the decisions cited and laid down by this court, and are made under circumstances which amount to gifts to the Wrigley Company, all of which we undertake to clearly establish upon final hearing in this case, as indicated in our supporting brief filed herewith.

We respectfully submit that such a disregard of the Master's report is not only in conflict with the rule well established by the decisions of this court cited in our brief filed herewith, but also with the rules of public policy so often declared by the court as forming the basis of equitable relief. Courts of equity award no premiums to dishonesty; the decision here sought to be reviewed does exactly that, and the learned judges who make up the court seek to justify such action on their part by stating that "the award

here in issue is so palpably and unquestionably ample to fully compensate Larson for any and all invasion of its rights as to suggest no circumstances which invoke the court's discretion by allowance of interest back of the date of the Master's report."

And yet in the same opinion from which this quotation is made, the court uses the following language:

> "But apart from the proposition of the law of the case, we are satisfied that under the very exceptional circumstances here appearing Wrigley is in no position to claim that Larson did not compete, and was an unknown factor in much of the territory wherein 'Doublemint' was sold. The forestalling and oppressive tactics employed by Wrigley for the purpose of eliminating Larson as an actual or potential competitor, cry out against Wrigley's urging in defense the success of these very tactics. Wrigley may not thus lawlessly clip Larson's wings, and escape liability for the profits of its appropriation of Larson's package dress on the plea that Larson could not fly."

We believe that no other court administering equitable remedies ever before assigned the success of such actions as those here attributed to the Wrigley Company, and of which it was unquestionably guilty, as a reason for denying profits by its own decision belonging to the Larson Company to such a wrongdoer. We think the court also answered itself in these words from the same opinion:

> "Neither could it be known into what territory Larson would have pushed its trade but for Wrigley's oppressive and forestalling practices. The entrant into a field of endeavor might, thus early in his business career, be throttled and eliminated from competition, and his distinctive trade dress seized and used by a powerful opponent, with no measure for affording adequate relief. The more flagrant, and therefore the more effective the invasion of another's rights, the more certain and complete would be the invader's immunity. Injunctive relief may be sufficient for the future, but the invasion during the years of litigation to secure it, must be otherwise dealt with.

> Under all the circumstances we do not see how, in this case, a measure of recovery less than award of the entire net profits from the use of the infringing package would afford due measure of reparation. That an award on this basis might permit recovery of a larger sum than would likely have been the net profits of the injured party if left undisturbed, is an incident of the invasion of which this invader is not in position to complain."

IV.

Your petitioner further shows that both the Master and the District Court refused to allow as credit to the Wrigley Company as claimed by it the income and excess profit taxes which it asserted it had paid as "Doublemint's share of the gum manufactured and sold by it during the accounting period."

The Wrigley Company had claimed that it was entitled to a deduction on account of these taxes from the Doublemint gross profits, of $372,942.09, while the Circuit Court of Appeals held that it was entitled to a credit, as we understand the opinion of that court, of $888,276.52; this is also the interpretation of Messrs. Touche, Niven & Co., the accountants appointed by the Master upon the disclosures placed in the record as to the improper relations established by the executive officers of the Wrigley Company with Edward Gledhill, chief accountant of James Hall, the court accountant. We print herewith the report of Touche, Niven & Co. for convenience of reference and make the same a part of this argument and ask the court to note the burden thrown upon the Larson Company and the inequalities of taxation to which it is subjected as compared with the Wrigley Company, which has never acquiesced in the decision against it, has never paid anything thereon to the Larson Company or put itself in a position with the United States to deduct from accruing taxes the amount

lost by it through its unlawful invasion of the rights of the Larson Company.

And your petitioner avers that under the laws of the United States and the regulations established to carry such laws into effect, and the facts of this case, the said court had no power or jurisdiction to make this or any allowance to the Wrigley Company for income or excess profits taxes in advance of acquiescence by it in such allowance or until it had charged off the amount thereof as a loss, abandoned all appeals and paid the amount thereof to the Larson Company, whereupon it could recoup such payment from its next succeeding year's income and excess profits taxes, if equal to the loss incurred, and the Larson Company would be bound to include in its next tax return the amount so received. And your petitioner avers that this action of the court in thus ignoring the statutes, regulations and facts of the case will unsettle and destroy the certainty of this law and its administration, and encourage the forestaller and wanton aggressor to seize another's property, use and profit by such use, keep the true owner therefrom and without payment, if his opponent survives years of litigation and its incident expense he will under this decision profit by his wrong doing, all of which is a result against public interest and in conflict with the laws enacted by Congress, the regulations of the treasury department and the decisions of the officers and courts charged with its administration, and calls for the issuance of the writ herein.

VII.

And petitioner further shows to the court that the second decision of the Court of Appeals in this cause (275 Fed. 535) was brought about on the issue raised by your petitioner's motion made before the Master, to whom said

cause had theretofore been referred, to extend such accounting to the profits made by the Wm. Wrigley Jr. Co., Limited, organized in January, 1915, by the defendant under the laws of the Dominion of Canada and to which company the factory there owned by the defendant West Virginia Company and all other property connected therewith, including trade names, trade rights, trade dress were transferred and set over in consideration, among others, of the receipt by it of the capital stock of such Canadian corporation consisting of five hundred thousand dollars, par value, of preferred stock, and two million dollars, par value, common stock, and which Canadian Company continued the manufacture of the several brands of gum theretofore manufactured and sold by the complainant in Canada, complainant and defendant to your petitioner's counterclaim, from the date of such transfer, to-wit: January, 1916, including the brand known as Doublemint, in its infringing dress, to and including October 19, 1921. At the time this motion was made the Wrigley Company had in its treasury all the preferred stock; the common stock received was distributed as a dividend to the defendant's shareholders on the basis of five shares of Canadian Wrigley stock to each share owned of West Virginia Wrigley stock. The Canadian Company was owned and controlled by the Wrigley West Virginia interests; the tables showing the stock ownership of the two companies and the membership of the directories are found (X, 4095-4097).

This was a transfer *pendente lite* and with full knowledge through the common officers of the two corporations of the state of the record in this case; this cause was at issue both on the orginal bill filed by the Wrigley Company and on the counterclaim of the Larson Company. In behalf of the Larson Company we moved to extend the accounting to the acts of the Canadian Company in the sale of Doublemint gum in the infringing dress and made proof

of the facts of organization, ownership and control herein recited. We made no proof of bad motive in the formation of the company nor did we claim that the Larson Company was selling gum in Canada.

We relied upon the established principles of the law of *pendente lite* that parties, their privies and purchasers *pendente lite* (and in no proper sense was the Canadian Company a purchaser) are bound by the decree; that even a purchaser *pendente lite* is not a necessary party because his vendor or grantor continues as the representative of his interests; that motives of parties, the doctrine of corporate entity, etc., important under some circumstances, are of no importance in a court of equity, and certainly as applied to such a trespasser as the Wrigley Company had been adjudicated to be, and yet owning and controlling the Canadian properties; and finally that the question was not an open one, as it had been decided in the second appeal. (275 Fed. 535.)

In the interest of brevity we do not make averments here as to the question of the separation by the Master of the accounting for the infringements in Canada and those elsewhere embraced in the Master's report. The authorities cited are referred to in VII of the points of the brief filed in support of this petition.

It is submitted that the errors here shown in the disregard of the decision in 275 Fed. 535, by both the District Court and the Court of Appeals in the opinion here sought to be reviewed, are such as to require the issue of the writ here sought, as is also the unwarranted assumption by both of said courts that unless there is proof of bad faith on the part of defendant, such defendant can escape all liability on a pending infringement case, and in the face of decisions such as those made in 253 Fed. and 275 Fed. between these parties by transfer of all the assets owned

by it to a corporation organized in a foreign country, which works no change in ownership but only in "legal entities."

It is submitted that this conclusion of both courts is so foreign to the decisions of this court heretofore made that we need not argue such a proposition; we may be permitted, as we hope, to express our amazement that a court so clearly comprehending the iniquity of the course of the Wrigley Company in its persecution of the Larson Company has been found able to find so many heretofore unheard of ways to deprive it of the victory awarded it.

In behalf of the Larson Company we ask that the *writ of certiorari* issue herein, and that upon full hearing the decree of October 14, 1918, be amended by order of this court by striking therefrom the words "making proportionate deductions for overhead, advertising and other proper expenses," and a decree against the Wrigley Company ordered for the gross profits of $5,152,689.32, with interest thereon at six per centum per annum from November 12, 1918, to the entry of such decree, as a willful trespasser on the rights of the Larson Company and at all times seeking by fraudulent and dishonorable means through the processes of the courts to eliminate the Larson Company as an actual or potential competitor, to lawlessly clip Larson's wings, and for all such other and further relief as the rules and policy of courts of equity warrant, in order that such practices may be effectually discouraged.

Respectfully submitted,

CHARLES H. ALDRICH,
Solicitor and of Counsel for
L. P. Larson, Jr. Company.

GEORGE I. HAIGHT,
CHESTER D. KERN,
RALPH L. PECK,
Of Counsel.

EXHIBIT A.

IN THE

DISTRICT COURT OF THE UNITED STATES.

NORTHERN DISTRICT OF ILLINOIS.

EASTERN DIVISION.

Wm. Wrigley, Jr., Company,
Complainant,
vs.
L. P. Larson, Jr., Company,
Defendant and Counterclaimant.
} No. 488.

DECREE.

The defendant and counterclaimant heretofore having appealed to the United States Circuit Court of Appeals for the Seventh Circuit from the decree made by this court in this cause on the fourteenth day of March, 1917, dismissing the said counterclaim of the defendant for want of equity, and the original plaintiff Wm. Wrigley Jr. Company having likewise appealed from the decree of this court of the same date dismissing the bill of the said complainant for want of equity, and the said United States Circuit Court of Appeals, having at the October Term, 1917, duly heard the said appeals upon the transcript af the record and arguments of counsel, and having thereupon ordered, adjudged and decreed that said decree dismissing the bill of the Wm. Wrigley Jr. Company was right and just, but that the decree dismissing the said counterclaim was erroneous and should be reversed and annulled, and that the counterclaimant L. P. Larson Jr. Company was and is entitled to an injunction and accounting against the Wm. Wrigley Jr. Company on account of the Doublemint package manufactured and sold by the said Wm. Wrigley Jr. Company; and the said United States Circuit Court of Appeals having remanded said cause to this court,

with instructions to enter an injunction and order an accounting, and to take such proceedings in said cause as, according to right and justice and the laws of the United States, ought to be had, the said appeal notwithstanding, which said decree, order and instructions appear to this court by the mandate of the said United States Circuit Court of Appeals duly by leave of this court filed herein on September 30, 1918.

Now, therefore, in conformity with said mandate, it is ordered and decreed that Wm. Wrigley Jr. Company, claimant and defendant to said counterclaim, its officers, attorneys, servants and agents be and they are each hereby perpetually enjoined and restrained from putting up, or selling, advertising or offering for sale or giving away, or employing or continuing to employ in advertisements, any gum of said Wm. Wrigley Jr. Company in dress, wrappers or labels identical with or in combination substantially like the dress, wrappers or labels heretofore and now used on the brand of gum of complainant known as "Doublemint", as shown by Exhibit No. 3 to the said bill of complaint, a specimen package of which is hereto annexed and marked "Specimen Complainant's Exhibit No. 3", and made a part hereof, and from using or employing in the manufacture, sale, advertisement or distribution of gum made or distributed by said Wm. Wrigley Jr. Company a dress, wrappers or labels identical with or in combination substantially like the dress, wrappers or labels used and employed by L. P. Larson Jr. Company upon and in connection with its "Wintermint" gum as shown by Exhibit No. 4 to the bill of complaint and Exhibit No. 2 to the counterclaim of said L. P. Larson Jr. Company, a specimen of which said package is hereto attached and marked "Specimen Defendant's and Counterclaimant's Exhibit No. 2 and Complainant's Exhibit No. 4", and from using or employing upon or in connection with the manufacture,

putting up, advertisement or sale of the gum of said Wm. Wrigley Jr. Company any dress, wrappers or labels calculated to induce the purchase of the gum of the Wm. Wrigley Jr. Company as and for the gum of the L. P. Larson Jr. Company; provided, however, that said Wm. Wrigley Jr. Company may have a period of ninety days from the entry of this decree to comply with the terms and conditions of said injunction, injunction writ not to issue before ninety days from date hereof; subject, however, in sales during that period to the accounting hereinafter ordered. This injunction in nowise relates to or affects the Spearmint packages, wrappers or labels shown by Complainant's Exhibit No. 2 attached to the Bill of Complaint, or the rights of either party herein or thereto. A specimen of said Spearmint package is marked Ex. 2 and made a part hereof.

And this court doth further order and decree that the cause be referred to Charles B. Morrison, one of the masters of this court, with all the usual powers of a master in such accountings, to take an account of all the gains and profits of Wm. Wrigley Jr. Company to it accruing or arising from the manufacture and sale of its Doublemint gum in the dress hereinbefore enjoined, from its first sale on July 28, 1914, to the date of the entry of this decree and such further time, not exceeding ninety days, as may be necessary to comply with this decree, and until further compliance therewith.

The said master shall have power to employ chartered accountants to examine the books of Wm. Wrigley Jr. Company for the period covered by the decree; if he decides so to do, he shall select persons who have no interest in the questions in controversy between the parties herein, to whom he shall administer an oath to impartially and faithfully examine all books, orders, shipments, reports, letters and files of said Wm. Wrigley Jr. Company, to as-

certain the profits, if any, accruing to said company from the sale of Doublemint as contradistinguished from the other brands of gum made by said company during the period, making proportionate deductions for overhead, advertising and other proper expenses, and report the facts for each year embraced in the terms of the decree, priovided that, if said Wm. Wrigley Jr. Company, or its officers, do not allow such accountants full, free and complete access to said books, papers and documents on and for said accounting aforesaid, then on not less than three days' notice, said Wm. Wrigley Jr. Company and its officers are ordered and directed to produce before said master all its books, papers and documents, at the time and place requested, proper and pertinent to the accounting ordered; with leave to the parties to adduce evidence as they may be advised, to support or assail such report of the accountants, and to have before the master all books, papers and documents of the Wm. Wrigley Jr. Company necessary for that purpose, and to the master to adopt, modify or reject the report of such accountants as he may be advised; the said master returning the report of the accountants with the evidence and his conclusions of fact and law to this court.

The parties may apply to the court from time to time for further direction as they may be advised.

Enter:

CARPENTER,

Judge.

Specimen Complainant's Exhibit No. 3.
Specimen Defendant's and Counterclaimant's Exhibit No. 2 and Complainant's Exhibit No. 4.

EXHIBIT B.

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE SEVENTH CIRCUIT.

October Term and Session, 1926.

No. 3727.
L. P. Larson, Jr., Company,
Appellant,
vs.
Wm. Wrigley, Jr., Company,
Appellee.
No. 3728.
Wm. Wrigley, Jr., Company,
Appellant,
vs.
L. P. Larson, Jr., Company,
Appellee.

Appeals from the District Court of the United States for the Northern District of Illinois, Eastern Division.

April 2, 1927.

BEFORE ALSCHULER, EVANS and PAGE, Circuit Judges.

ALSCHULER, Cir. J. Both parties appeal from a decree which awarded L. P. Larson, Jr., Company (herein called Larson) $1,384,649.12, as net profits on sales by Wm. Wrigley, Jr., Company (herein called Wrigley) of the latter's brand of "Doublemint" gum sold in package dress held by this court to have infringed Larson's "Wintermint" gum package. The decree for the accounting was awarded pursuant to the direction of this court as made in *Larson Jr. Co.* v. *Wrigley Jr. Co.*, 253 Fed. 914. During the accounting certain questions arose which were brought to, and considered and determined by this court. *In re Larson Jr. Co.*, 275 Fed. 535. The facts leading to these adjudications, together with quotations from those opinions here applicable, and the propositions there and here in controversy, are clearly and sufficiently set forth in Judge Wilkerson's opinion disposing of exceptions by Wrigley to the master's report. *Wrigley Jr. Co.* v. *Larson Jr. Co.*, 5F. (2d) 731.

The thousands of pages of evidence taken before the master, the near 1,500 pages of briefs submitted here, with indexed citations (including duplications) of over 800 cases, have imposed on us a task of no mean proportions, in considering the various more or less complicated questions.

At the threshold we are met with the question of the scope of the accounting under the decree—whether Wrigley must account for all sales of "Doublemint" in the infringing dress, or only such as were made in territory wherein Larson competed with Wrigley, and, incidentally, whether Wrigley was entitled to show that "Doublemint," however in the infringing dress, was sold with knowledge on the part of purchasers that it was Wrigley's product, or whether the sales were made because of the superiority of the Wrigley product, and faith in the Wrigley name, and to no extent because of Larson's standing or reputation in the trade.

We are in accord with Judge Wilkerson's reasoning and conclusion that the decisions of this court determined the law of the case thereon, and that the accounting was to be for profits arising from all the sales—meaning, of course, the net profits. The consolidated causes involved in the first appeals had been fully heard upon their merits, and pursuant to the reversing and remanding order for decree on Larson's counterclaim, the District Court entered its decree for an accounting for all the profits, and if there remained any question as to the law of the case in this regard, it was settled by this court upon the subsequent appeal and mandamus proceedings here. (275 Fed. 535.)

But apart from the proposition of the law of the case, we are satisfied that under the very exceptional circumstances here appearing, Wrigley is in no position to claim that Larson did not compete, and was an unknown factor in much of the territory where "Doublemint" was sold. The forestalling and oppressive tactics employed by Wrigley for the purpose of eliminating Larson as an actual or poten-

tial competitor, cry out against Wrigley's urging in defense the success of these very tactics. Wrigley may not thus lawlessly clip Larson's wings, and escape liability for the profits of its appropriation of Larson's package dress on the plea that Larson could not fly.

If the rule contended for by Wrigley were here to prevail, it is apparent that little or no proof could be made of substantial profits, or damages either. It would be manifestly impossible, even if the infringement were of the "Chinese copy" variety, to show that, but for the sale of Wrigley's "Doublemint" in the infringing dress, the individual users would have purchased Larson's "Wintermint." Even if in a few instances this might be done, it would be humanly impossible, even though the effort and expense were not prohibitive, to have sought out and produced the evidence from any considerable number of users. Neither could it be known into what territory Larson would have pushed its trade but for Wrigley's oppressive and forestalling practices. The entrant into a field of endeavor might, thus early in his business career, be throttled and eliminated from competition, and his distinctive trade dress seized by a powerful opponent, with no measure for affording adequate relief. The more flagrant, and therefore the more effective the invasion of another's rights, the more certain and complete would be the invader's immunity. Injunctive relief may be sufficient for the future, but the invasion during the years of litigation to secure it, must be otherwise dealt with.

Under all the circumstances we do not see how, in this case, a measure of recovery less than award of the entire net profits from the use of the infringing package would afford due measure of reparation. That an award on this basis might permit recovery of a larger sum than would likely have been the net profits of the injured party if left undisturbed, is an incident of the invasion of which this invader is not in position to complain.

The account which Wrigley filed with the master showed for the accounting period (July 28, 1914, to December 2, 1918) total sales of all brands of gum (except in Canada and Australia) of nearly $57,000,000, of which the total of "Doublemint" in the infringing dress was almost $9,000,000, and the gross profits attributable to "Doublemint," $5,152,689.32. As to these figures there is no controversy.

The contested issues on the accounting arise over allowance or rejection of various items claimed by Wrigley in reduction of this gross "Doublemint" profit. The first Wrigley account filed showed items which indicate for the entire accounting period some loss on "Doublemint." A supplemental account, later filed on its behalf, introduced additional items in reduction, which show much greater loss for the period.

Advertising.

The item of most importance, and perhaps most sharply controverted, is that of advertising. For years prior to putting out the "Doublemint" brand, Wrigley was an extremely heavy advertiser, and before placing "Doublemint" on the market had established a large trade in gum—"Spearmint" being its specially advertised brand. On putting out the "Doublemint" brand, a very heavy and extensive advertising program was inaugurated, and for a considerable time "Doublemint" was greatly stressed. The previously heavily advertised "Spearmint" continued also to be much advertised, and later the policy seemed to be to put special stress on the name "Wrigley," but including both "Doublemint" and "Spearmint" in the advertising matter. Still later in the period Wrigley brought out the "Juicy Fruit" brand, and advertised it with the rest, though not so extensively as "Doublemint." The total expended during the accounting period for advertising, such as newspaper, magazine, billboard, street car advertising, electric signs, and the like, was $6,798,662.73.

Intricate computations of the advertising items were made, each on a different basis, for allocating to "Doublemint" its proper proportion of these items. Wrigley's accountant assigned to "Doublemint" $2,872,844.43, while Larson's accountant fixed it at $1,017,183.59. The master worked out a complicated system whereby a very considerable portion of the advertising was charged up as "institutional," to be amortized in four years; that is, one-fourth of the cost to be charged off for each year as the expense for that year of such advertising. In this way alone much of the advertising expense for the last three years of the period was projected forward; for example, for an "institutional" advertisement for the last year of the accounting period only one-fourth would be charged against the gross profits for that period, and three-fourths projected beyond that period, upon the theory that the advertisement, though contracted and paid for in the first year, will be effective as an advertisement for four years, and that such future benefit will accrue to Wrigley as an institution. We cannot accept as practically probable the proposition that an advertisement is as potent throughout a four-year period as during the year of its publication. And this applies, in large measure, as well to much of the more permanent forms of advertising, such as billboards and electric signs. In time even these become obsolete and stale, and from time to time are renewed or changed, to say nothing of the cost of upkeep. Besides, all of that part of the advertising cost attributable wholly to the infringing "Doublemint," which remained unearned at the close of the accounting period, became lost to Wrigley through the injunction. Nevertheless, the expense for this advertising had been contracted and paid for in good faith, and however it may have been wholly or partly unearned at the close of the accounting period, it was none the less an expense which should be deducted in fixing the net profits on "Doublemint." Where the injured party seeks the profits of an

infringer, he takes the chance of their reduction or even extinguishment through expenses and losses actually incurred, however unwisely or even improvidently, so long as they were incurred in good faith.

Our investigation of the record, and consideration of the briefs convinces us that far too large part of the advertising expense was, by the master's report, accredited to the future, and not sufficient to the accounting period, and that much too small a part of the entire advertising costs was attributed to 'Doublemint."

To undertake the allocation of each of the almost innumerable items of advertising to the various brands, and to "institution," would be indeed a most difficult task, and one wherein certainty would not, in the nature of things, be possible. But laborious examination of the many advertisements appearing in the transcript, and of the numerous tables, charts, graphs, and computations thereon, and the evidence concerning them, together with the very elaborate arguments of counsel submitted on the subject, and the report of the master and the opinion of the district judge, satisfies us that the conclusions and findings and figures reached by the district court upon the subject of advertising far more nearly comport with the approximate equity between these parties than those the master reported. Upon this item we quite despair of reaching a result more equitable than that reached by the District Court, and we see no reason for disturbing its conclusions thereon, as carried into the decree.

Contingent Liability for Unredeemed United Profit Sharing Coupons.

On this item the master charged against "Doublemint" gross profits, $98,519.06, which the District Court increased by $64,715.60. With each 5-cent package of gum there was enclosed a profit sharing coupon good for one-fifth of a

cent, and also coupons of larger denominations with cartons of gum packages. The coupons were exchangeable either for cash or merchandise, and unlimited as to time of presentation. Many millions were put out each year. Their redeemability in articles of merchandise of various kinds was an incentive for saving them until sufficient quantities accumulated to effect a desirable exchange. Of course many became lost and will never be redeemed. As to those actually redeemed no question arises. The dispute comes respecting those not redeemed, which continue to be a potential liability of Wrigley, since Wrigley must pay the Profit Sharing Company on the basis of $3 for each 1,000 of one-fifth cent coupons presented. Evidence was offered of the experience of others who had for many years given out such coupons with their merchandise. There was evidence of very substantial redemptions for many years after their issuance. It appears that the government, in the computation of profits, allowed Wrigley 60 per cent of the face value of the coupons issued in each year as fairly representing this liability. The master's allowance was based on a 33⅓ per cent of such redemption, which the district judge raised by 5 per cent. From a careful review of the situation we are satisfied that the percentage of redemption allowed by the court is still too low, and ought to be somewhat further increased. In our judgment an additional 6⅔ per cent over and above the further allowance by the District Court, making in all 45 per cent, probably would not overestimate Wrigley's ultimate liability upon the unredeemed coupons, and we are of opinion that this charge against "Doublemint" gross profits should be increased accordingly.

Wrigley's account, as first filed, claimed for this item $563,933.89 attributable to "Doublemint" profits; in the supplemental account filed it was stated at $621,108.97. The master states that these figures so claimed are on the basis that the "Doublemint" profits were the last to be made and should bear the highest rate of tax, but states that this theory was afterwards conceded to be improper, and that the "Doublemint" share of federal taxes, on the basis of the proportion of profits, would be $372,942.09. Both master and court refused to allow any such tax in reduction of the profits, and the decree represents no deduction for such taxes paid by Wrigley.

We do not understand why federal income and excess profits taxes paid by a corporation are not a proper item of expense to be charged against the gross profits for the year in the ascertainment of what the net profits for such year were. If instead of only the "Doublemint" profits, Larson were held entitled to receive from Wrigley the entire net profits of the Wrigley business, can it be doubted that there would be deducted from the gross profits the federal income and excess profits taxes which Wrigley had paid? This might be simple enough in a case where the accounting was for the net profits of an entire business. But is the principle any different where the liability is for only a part of the net profit?

It is stated, both by the master and the district judge, that Larson would, in any event, have to pay federal income tax on the amount decreed, for the year in which the decree was paid. This might be so in some cases. But if it appears that the amount decreed is only what is left after reimbursement to Wrigley of the federal tax already paid thereon, it is unthinkable that collection of the same tax from Larson would be again undertaken.

Moreover, the very theory on which Larson may recover these net profits from Wrigley is that Wrigley, in handling the infringing "Doublemint" gum packages, did so as Larson's trustee or agent—albeit, *ex maleficio*. While equity requires in such circumstances accounting for the profits, equity also allows in reduction, outlays in that behalf made in good faith; and what outlay more necessary—yea, compulsory, than the federal income and excess profits tax? If an agent, conducting business for an absent principal, pays such tax on the profits, should the principal be required to pay another such tax if and when he collects the balance due him from the agent? Surely this ought not to be.

The master reasoned that if required to pay the net profits, unreduced by "Doublemint's" fair proportion of the tax, Wrigley could deduct the whole amount paid from subsequently returned profits taxes. This would scarcely meet the situation. There may be no profits adequate therefor, in which event the tax thus paid would be lost to Wrigley. But, in any event, we do not think it would be equitable as between these parties to require Wrigley to pay back the full net profits without any reduction for this tax, on the faith that somehow and somewhere and sometime it will be refunded.

In dealing with a comparable situation, Judge Rose said: "Where the owner of a patent seeks to charge the infringer, as a trustee, with the profit made, no arbitrary rule should require him to turn over a sum greatly exceeding any profit the law has allowed him to keep for himself. Only equity can award profits, and, in equity, equity must be done." *Sly Mfg. Co.* v. *Pangborn Corp.*, 276 Fed. 971. The Court of Appeals specifically approved this reasoning. S. c. 284 Fed. 217.

While not undertaking to lay down a hard and fast rule for fixing the amount of such tax deduction, we venture some suggestions thereon. It is contended for Wrigley

that since the Wrigley profits for the rest of the business carried the Wrigley taxes into the highest bracket, the additional tax on account of the profit attributable to "Doublemint" should be fixed at such rate. There would be more in this contention if Larson's excess profits taxes for the years in question likewise reached into the highest bracket, so that further profit would likewise have carried the highest rate.

But if this is not the fact, it would not be equitable to require Larson to pay at a higher rate than that at which it would have paid if the net profits had been paid by Wrigley to Larson as they accrued, and before Wrigley had paid any tax thereon. In undertaking to avoid inequity toward Wrigley, inequity should not be done Larson through requiring Larson to bear a higher tax than would have been collectible had the profits been paid over as earned.

It occurs to us that the total net profits awarded Larson (without deduction for federal income and excess profits taxes) should be allocated, as nearly as may be, to each year during the accounting period in which they were earned; and that, considering such amounts for each year as additional net profit to Larson in such year, the added amount of income and excess profits tax thereon which Larson would have had to pay should be estimated, as nearly as may be done; the aggregate of such yearly additional tax which Larson would thus have been required to pay, to be deducted from the profits on "Doublemint" as found. Larson would thus be paying only the taxes it would have paid had it received the profits as they accrued, and Wrigley will have credit at once for the taxes thus paid on Larson's profits. True, this might leave Wrigley out of pocket to the extent that its payment at the highest rate on "Doublemint" profits exceeded the amount at any lower rate at which Larson would have been charged; but this is not Larson's fault, and if, as between the two, one must

suffer, it should be Wrigley, who brought about the condition. Whether or not Wrigley might then have a collectible claim against the government through having paid at a higher rate upon the profits to which Larson was entitled, and which Larson thus actually paid at a lower rate, is not here involved.

Possibly difficulty will be experienced in allocating the net profits awarded (exclusive of deduction for these taxes) to the different years of the accounting period. While it may be this cannot be accurately done, it should be approximated as nearly as the nature of the case will admit. Of course nothing here said has application to whatever, if any, liability for income tax may accrue to Larson on account of payment, when made, of interest on the award.

We are of opinion that the amount of this tax attributable to the net profit on "Doublemint" should be ascertained under the direction of the District Court, and the award to Larson reduced accordingly.

Interest on Invested Capital.

Under this heading the District Court allowed a deduction of $259,120.54 from gross profits for interest on investment in patents and patent rights. The master's report refused all allowance for such interest. As pointed out in Judge Wilkerson's opinion, this court is committed to the principle that in such cases interest on invested capital should be deducted. No valid reason appears to us why the amounts which the court fixed are not proper. There was evidence that the gum-making machinery covered by the patents which Wrigley acquired was in constant and profitable use in the Wrigley factories during the infringing period, and to the extent of Wrigley's actual investment in such patents, it is not apparent to us why a fair proportion of interest thereon attributable to "Doublemint"

should not be deducted from the gross profits, as well as the interest on investment in tangibles. We are in accord with the District Court's disposition of these items.

Interest on Wrigley's Invested Profits.

We are likewise satisfied with the treatment by the District Court of this item, and see no reason for disturbing it.

Depreciation of Patents.

For this Wrigley claims reduction of an amount applicable to "Doublemint," at the rate of one-seventeenth of the value of the patents for each year of the accounting period, as applied to all the brands, upon the theory that this proportion of the life of the patent expired each year. There was no evidence of depreciation beyond that afforded by the flight of time. It might well have been the case that the patents did not depreciate in value, but that, in fact, they appreciated, depending quite wholly upon conditions other than the expiration of a portion of a period of their grant. We believe the allowance of interest on the investent in the patents is, under all the circumstances, a sufficient charge against profits on account of the patents.

Profits of Canada Corporation.

The District Court properly found that the accounting should not extend to the profits of this corporation. It was organized in Canada for the purpose of carrying on the gum business there; and while its stockholders were also Wrigley stockholders, and it handled there the Wrigley brands in very much the same manner as they were handled in the United States, it was a distinct entity, organized admittedly in good faith, and was not a party to this action.

ACCOUNTANT'S FEES.

The master recommended the allowance of the fees of Touche, Niven & Co., accountants, for $17,591.21 for their services. The court in its opinion disallowed the fees as costs, but gave no reason. There is nothing in the decree thereon, and so far as this may be regarded an adjudication we consider the item, and the very full discussion thereof in the briefs and arguments. The decree of the District Court authorized the master to employ accountants, which he did, and their fees of $7,359.50 have been properly ordered allowed as costs. Each party additionally employed its own accountants—Touche, Niven & Co. by Larson. The master's recommendation of allowance was upon the theory that the account filed by Wrigley was not correct, and not such an account as was contemplated by equity rule 63. It is true that the accounts filed showed for the accounting period a substantial loss on "Doublemint." The very important elements of sales of "Doublemint," manufacturing costs, and gross profits were accepted without dispute; and likewise substantially all of the item of nearly $1,000,000 for overhead expenses. The loss shown is made to appear from items, the allowance or disallowance of which was influenced rather by the correct principle to be applied, than by falsity in the disclosure.

As to the most important item, advertising, there was no dispute as to amounts paid, but as to their allocation. Wrigley asserted that something over $2,800,000 should be charged to "Doublemint." Touche, Niven & Co. reported slightly over $1,000,000 as so applicable. Various theories of allocation were put forth—proportion of sales, space method, brand advertising, and institutional advertising. To elaborate each of these, with the exception of the first, involved investigation and computation of vast data. Such data as Wrigley had were without objection or concealment at the disposal of all concerned. Then there was Wrigley's

contention of nearly $300,000 for interest on good will, which was rejected, and for federal income tax, which was also disallowed, and certain other items claimed, the allowance of much of which would indeed have wiped out all the profit on "Doublemint." The fact that such were claimed as deductions from the gross profits which were truly disclosed, was not, in our judgment, such a transgression of equity rule 63 as to have warranted the allowance against Wrigley of this item of accounting expense, and the court properly disallowed it.

INTEREST ON AWARD.

The master recommended allowance of interest on the award on his finding of net profits at the rate of 6 per cent per annum, from the end of the accounting period, December, 1928. The decree adopted the same rate, but fixed as the beginning date for interest on the award, the filing of the master's report, November, 1923.

In a number of cases of accounting for infringement of patents, this court has allowed interest from date when infringement ceased. *B. F. Goodrich Co.* v. *Consolidated Rubber Tire Co.*, 251 Fed. 617; *Malleable Iron Range Co.* v. *Lee*, 263 Fed. 896; *Superior Tool Machine Co.* v. *Cincinnati Lathe & Toole Co.*, 284 Fed. 267; *Starr Piano Co.* v. *Auto Pneumatic Action Co.*, 12 F. (2d) 586.

In the first three of these cases the award was for damages, the first two predicated on reasonable royalty, and the third on lost profits. In these the power of the court to award additional damages up to treble the amount found is given by statute in cases of infringement of patent, and the court has discretion to increase the damages found, whether by the name of interest or otherwise; and in the last case cited the discretion to award damages where profits were allowed, was justified, not only upon the prior cases, but further upon *Miller* v. *Robertson*, 266 U. S. 243.

This was not a suit for infringement of patent, but involved damages for breach of a contract, and from this case the opinion in *Starr Piano Co.* quotes this sentence: "When necessary, in order to arrive at fair compensation, the court, in the exercise of a sound discretion, may include interest or its equivalent as an element of damages," the inference being that in the *Starr Piano* case carrying back the interest was deemed proper to arrive at fair compensation.

The principle is not new. It was old even in *Tilghman* v. *Proctor,* 125 U. S. 136, where the court, upon a similar question, said: "If the question thus presented were a new one, it would require grave consideration. But by a uniform current of decisions of this court, beginning thirty years ago, the profits allowed in equity, for the injury that a patentee has sustained by the infringeent of his patent, have been considered as a measure of unliquidated damages, which, as a general rule, and in the absence of special circumstances, do not bear interest until after their amount has been judicially ascertained; * * * (citing cases) * * * Nothing is shown to take this case out of the general rule. * * * Interest therefore should be allowed— * * * only from the day when the master's report was submitted to the court." This case, while recognizing the general rule, does not exclude the discretion of the court to allow interest back of that date, where "special circumstances" may justify. In the recent patent infringement accounting case of *National Tube Co.* v. *Mark,* 10 F. (2d) 430, (6 C. C. A.), where damages were fixed on a royalty basis, the court, considering the question of interest, while stating that it was usual to allow it only from date of master's report, exercised its discretion to make further allowance under the particular facts of that case by awarding further interest for half the time between date of infringement and date of master's report.

It must be remembered that in the appeals here there is not involved a patent, or a statutory trade-mark, and that any rules peculiar to such do not of necessity apply in fixing interest; but the usual practice of computing interest in an accounting from the date of the master's report, prevails, unless, as indicated in the cases cited, circumstances require an earlier beginning date. The award here in issue is so palpably and unquestionably ample to fully compensate Larson for any and all invasion of its rights, as to suggest no circumstances which invoke the court's discretion to enlarge it by allowance of interest back of the date of the master's report, a condition which, in our judgment, likewise forbids an interest rate above 5 per cent.

We do not deem it necessary to present further discussion of questions raised in the briefs, especially such as were considered and determined in Judge Wilkerson's opinion. We approve the decree of the District Court in all respects, save as to the items of United Profit Sharing Coupons, federal income and excess profit taxes, and rate of interest upon the award; and in order that the decree may be made to conform with our views as above stated respecting these items, and to take further evidence, if deemed necessary, respecting the item of federal income and excess profits taxes, and to make further deductions accordingly from the award as made, the cause is remanded to the District Court with direction further to proceed, and to enter a decree in consonance with these views.

The costs in this court of these appeals shall be divided equally between the parties.

A true Copy:

Teste:

.....

Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.

EXHIBIT C.

Telephone Franklin 0976

Cable Address "Retexo"

YORK
AGO
ELAND
OUIS
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NTA

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lent Partners
R. Whitworth, A. C. A., C. P. A.
C. Brown, C. A., C. P. A.

Members of
American Institute
of Accountants

April 15, 1927.

C. H. Aldrich, Esq.,
Austin Building,
Chicago, Illinois.

DEAR SIR:

WRIGLEY VS. LARSON.

The decision handed down by the Court of Appeals instructs that the amount awarded, exclusive of taxes, shall be allocated to years and that there shall be deducted therefrom the amount of income and excess profits taxes which the Larson Company would have paid in the respective years if the awarded profits had been paid over in the years in which they accrued. In other words, the profits on which the Larson Company paid taxes shall be adjusted to include the present award and the tax thereon recalculated; the difference between the tax on this basis and that paid being the amount to be deducted from the total award of $1,298,290.84.

We have allocated the expenses, ascertained the profits or losses, as awarded, for the respective years and calculated the taxes thereon by the method suggested by the Court, as we understand it, and submit herewith a statement thereof. The tax as thus computed amounts to $888,276.52, which, deducted from the amount of award ($1,298,290.84), leaves a balance of $410,014.32. Our understanding of the

law is that losses in one year cannot be deducted from profits of another year, and if this be correct, the awardable profits on the basis of taxes estimated as explained above plus interest on award aggregate $801,938.62, as follows:

Profits after Federal taxes—	
Year 1916	$281,600.84
Year 1917	256,392.95
Year 1918	144,507.16
	$682,500.95
Interest thereon at 5% for 3½ years	119,437.67
	$801.938.62

The Revenue Act of 1917, as you will doubtless remember, provided for assessment of excess profits taxes and the Act of 1918 provided, in addition, for war profits taxes. Invested capital was a material factor in the calculation of both these taxes. For example, the Act of 1917 allowed a deduction from taxable income of from 7% to 9% of invested capital, plus $3,000.00, the balance to be taxed as follows:

Income equivalent to—

15% of invested capital, less above deductions at	20%
Between 15% and 20% of invested capital at	25%
Between 20% and 25% of invested capital at	35%
Between 25% and 33% of invested capital at	45%
All over 33% at	60%

And the Act of 1918 increased these rates to the maximum of 80% for war profits taxes. It will thus be seen that the larger the invested capital the smaller the tax.

Owing to abnormal conditions existing at that time, the Act of 1918 provided (Section 327) that in cases where the tax was disproportionate to the income the taxpayer might apply to the Commissioner for assessment under Section 328, which provided that

> "the tax shall be the amount which bears the same ratio to the net income of the taxpayer (in excess of the specific exemption of $3,000.00) for the taxable year, as the average tax of representative corporations engaged in a like or similar business, bears to their average net income * * * for such year."

In such cases the Commissioner calculated the tax and advised the taxpayer of the amount thereof without disclosing what corporations were considered in the comparison. The instruction of the Court in the pending decision to consider "such amounts for each year as additional net profits to Larson in such year" and calculated taxes thereon places Larson in the position where the tax (to use the language of Section 327) "works upon the Corporation an exceptional hardship evidenced by gross disproportion between the tax computed without benefit of this section and the tax computed by reference to the representative corporations specified in Section 328" and, in our opinion, constitutes a case to be assessed under Section 328. The amount of tax the Commissioner would assess under the provisions of this section cannot even be estimated with any degree of assurance, and for that reason the Court's instruction for calculating the amount of tax cannot be worked out.

Taking the Court at its word, that it does not want Larson to suffer, but, "if, as between the two, one must suffer, it should be Wrigley who brought about the condition" the conclusion is unavoidable that the Court did not realize the effect of the suggested method of calculating the tax, especially in view of the following:

> "True, this might leave Wrigley out-of-pocket to the extent that its payment at the highest rate on Doublemint profits exceeded the amount at any lower rate at which Larson would have been charged"

the result is just the opposite, as will be seen from the following comparison of Doublemint profits and taxes, as ascertained by the Court, to *total* profits and taxes of the Wrigley Co. for the years 1916, 1917 and 1918:

	Total Wrigley profits and taxes (Col. 1)	Doublemint's proportion as awarded (Col. 2)	% of Doublemint's proportion to total (Col. 2 to Col. 1)
Profits for 1916	$2,377,819.53	287,347.80	8.28
Taxes for 1916	51,563.78	5,746.96	11.15
% of taxes to profits	2.17	2.00	
Profits for 1917	3,885,549.58	653,507.69	16.82
Taxes for 1917	1,117,307.26	397,114.74	35.54
% of taxes to profits	28.76	60.77	
Profits for 1918*	4,065,476.54	629,921.98	15.49
Taxes for 1918*	1,741,126.09	485,414.82	27.88
% of taxes to profits	42.83	77.06	

*January 1 to November 12, 1918, only.

It will be observed from the foregoing table that whereas the Court awards to Larson in 1916 8.28% of Wrigley's profits, it compels Larson to pay 11.15% of Wrigley's taxes; for 1917 the Court awards Larson 16.82% of Wrigley's profits and compels him to pay 35.54% of Wrigley's taxes which results in Larson paying $60.77 in taxes on each $100.00 of profits for that year, whereas Wrigley paid only $28.76 on the same amount of income. Again for 1918 the Court awards Larson 15.49% of Wrigley's profits for that year and decrees that he (Larson) shall pay 27.88% of the amount of taxes Wrigley paid, which results in Larson paying $77.06 taxes on each $100.00 of profits while Wrigley paid only $42.83 on each $100.00 of profits.

This disparity in taxes as between Wrigley and Larson ignores what we understand to be the admitted fact that Doublemint cost the same to manufacture, was sold through the same jobbers, at the same price and on the same terms as Wrigley's other brands of gum, and, furthermore, it is not in keeping with the Court's finding that

"Under all the circumstances we do not see how, in this case, a measure of recovery less than award of the entire net profits from the use of the infringing package would afford due measure of reparation."

The proportion of Doublemint sales to total sales was:

July 28 to December 31, 1914	16.1927%
Year 1915	18.692%
Year 1916	16.4229%
Year 1917	14.9424%
January 1 to November 12, 1918	14.016%
Average for period	15.74%

Another reason why it is unfair to compute Larson's taxes on the Court's suggested basis is that if Larson had been in possession of the profits at the time they accrued he could have spent, as Wrigley did, large sums for advertising and built up his Company's goodwill, and also could have paid himself and others larger salaries or bonuses, both of which would have reduced the amount of taxes payable.

While it is realized that the proposed method of computing taxes is for the purpose only of working out a settlement between the parties, it nevertheless is opposed to all tax procedure for the reason the profits were not reduced to possession, nor could they be brought under the Section relating to constructive receipt as contemplated by Articles 53 and 54 of Regulations 45. Furthermore, the scheme is opposed to this same Court's decision in the Jackson case, wherein they held that Mr. Jackson, who was receiver for the Chicago & Eastern Illinois Railroad Co., could not amend his filed returns to permit of spreading over the period of receivership the amount received as final fees for services, but on the other hand, they said, in effect, that since the amount was received in 1918 it should be taxed in that year. Moreover, the intimation contained in the Court's opinion in the present case to the effect that the amount received by Larson will not be taxed by the

Internal Revenue Department is in conflict with the law, see Section 112, Regulations 69, reading in part as follows:

> "Judgments or other binding adjudications, such as decisions of referees and boards of review under workmen's compensation laws, on account of damages for patent infringement, personal injuries, or other cause, are deductible from gross income when the claim is so adjudicated or paid, unless taken under other methods of accounting which clearly reflect the correct deduction, less any amount of such damages as may have been compensated for by insurance or otherwise."

Copy of Sections 327 and 328 of the Revenue Act of 1918 is attached hereto.

Your very truly,

TOUCHE, NIVEN & Co.

Statement of Profits on Doublemint as awarded by Circuit Court of Appeals

	1914	1915	1916	1917	1918	Total
Gross profits	$331,802.73	$1,027,617.08	$1,163,980.72	$1,367,177.84	$1,262,110.95	$5,152,689.32
Advertising	$426,387.95	$ 673,219.95	$ 445,632.60	$ 266,383.02	$ 241,911.45	$2,053,534.97
Overhead	64,802.88	191,439.73	217,403.13	226,124.91	215,735.44	915,506.09
Depreciation on buildings	2,617.52	.....	.....	.....	.....	2,617.52
Tax on essential oils	49.17	.....	.....	.....	.....	49.17
Salaries and expenses	560.03	.....	.....	.....	.....	560.03
Loss on merchandise sold with Doublemint	.....	4,303.06	10,702.86	6,063.10	8,810.61	12,258.41
Loss by fire at Bilize	.....	.....	.....	.....	1,700.30	1,700.30
Printing U. P. S. coupons	1,336.31	1,172.91	1,194.72	2,250.37	1,499.07	7,453.38
Paid for U. P. S. coupons	1,341.87	48,454.81	98,487.84	105,450.17	79,212.02	332,946.71
Contingent liability for U. P. S.	39,485.81	75,037.69	43,356.68	46,049.56	45,663.56	249,593.30
Miscellaneous income	255.09	1,315.46	7,541.02	5,075.35	12,015.81	26,202.73
Interest on capital invested in tangible assets	22,966.89	61,254.36	56,918.20	57,933.82	60,047.27	259,120.54
Interest on capital invested in patent rights	5,565.38	13,480.67	10,477.91	8,490.55	7,246.28	45,260.79
Total deductions	$564,858.72	$1,067,047.72	$ 876,632.92	$ 713,670.15	$ 632,188.97	$3,854,398.48
Net profits or losses	$233,055.99	$ 39,430.64	$ 287,347.80	$ 653,507.69	$ 629,921.98	$1,298,290.84
Federal income taxes (estimated)	.....	.....	5,746.96	397,114.74	485,414.82	888,276.52
	$233,055.99	$ 39,430.64	$ 281,600.84	$ 256,392.95	$ 144,507.16	$ 410,014.32

Add Losses—	
Year 1914	233,055.99
Year 1915	39,430.64
	$682,500.95
Interest on award at 5% for 3½ years=17½%	119,437.67
	$801,938.62

REVENUE ACT OF 1918

SECTION 327

That in the following cases the tax shall be determined as provided in Section 328:

(a) Where the Commissioner is unable to determine the invested capital as provided in Section 326;

(b) In the case of a foreign corporation;

(c) Where a mixed aggregate of tangible property and intangible property has been paid in for stock or for stock and bonds and the Commissioner is unable satisfactorily to determine the respective values of the several classes of property at the time of payment, or to distinguish the classes of property paid in for stock and for bonds, respectively:

(d) Where upon application by the corporation the Commissioner finds and so declares of record that the tax if determined without benefit of this section would, owing to abnormal conditions affecting the capital or income of the corporation, work upon the corporation an exceptional hardship evidenced by gross disproportion between the tax computed without benefit of this section and the tax computed by reference to the representative corporations specified in section 328. This subdivision shall not apply to any case (1) in which the tax (computed without benefit of this section) is high merely because the corporation earned within the taxable year a high rate of profit upon a normal invested capital, nor (2) in which 50 per centum or more of the gross income of the corporation for the taxable year (computed under section 233 of Title II) consists of gains, profits, commissions, or other income, derived on a cost-plus basis from a Government contract or contracts made between April 6, 1917, and November 11, 1918, both dates inclusive.

SECTION 328

(a) In the cases specified in section 327 the tax shall be the amount which bears the same ratio to the net income of the taxpayer (in excess of the specific exemption of $3,000) for the taxable year, as the average tax of representative corporations engaged in a like or similar trade or business, bears to their average net income (in excess of the specific exemption of $3,000) for such year. In the case of a foreign corporation the tax shall be computed without deducting the specific exemption of $3,000 either for the taxpayer or the representative corporations.

In computing the tax under this section the Commissioner shall compare the taxpayer only with representative corporations whose invested capital can be satisfactorily determined under section 326 and which are, as nearly as may be, similarly circumstanced with respect to gross income, net income, profits per unit of business transacted and capital employed, the amount and rate of war profits or excess profits, and all other relevant facts and circumstances.

(b) For the purposes of subdivision (a) the ratios between the average tax and the average net income of representative corporations shall be determined by the Commissioner in accordance with regulations prescribed by him with the approval of the Secretary.

In cases in which the tax is to be computed under this section, if the tax as computed without the benefit of this section is less than 50 per centum of the net income of the taxpayer, the installments shall in the first instance be computed upon the basis of such tax; but if the tax so computed is 50 per centum or more of the net income, the installments shall in the first instance be computed upon the basis of a tax equal to 50 per centum of the net income. In any case, the actual ratio when ascertained shall be used in deter-

mining the correct amount of the tax. If the correct amount of the tax when determined exceeds 50 per centum of the net income, any excess of the correct installments, over the amounts actually paid shall on notice and demand be paid together with interest at the rate of one-half of one per centum per month on such excess from the time the installment was due.

(c) The Commissioner shall keep a record of all cases in which the tax is determined in the manner prescribed in subdivision (a), containing the name and address of each taxpayer, the business in which engaged, the amount of invested capital and net income shown by the return, and the amount of invested capital as determined under such subdivision. The Commissioner shall furnish a copy of such record and other detailed information with respect to such cases when required by resolution of either House of Congress, without regard to the restrictions contained in Section 257.

EXHIBIT D.

In their petition for a rehearing in the cause reported in 275 Fed. 535, the counsel for the Wrigley Company said to the court:

> "But the court holds that in its prior opinion it found appellee guilty of wilfully trespassing upon appellant's rights and seeking to injure appellant by intentionally forestalling its Wintermint trade, and that appellant was, therefore, entitled to a perpetual injunction 'universal in place'. The court now further holds that appellee is estopped by the court's prior opinion from showing what portion of the sales, already accounted for by it, were made in non-competitive territory, that is, in markets which appellee was offering to prove appellant had never entered or intended to enter, and in which appellant and its products were wholly unknown."
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> • • • • •
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> "This doctrine of agency is, we submit, absolutely without precedent (and the court cites none) and is contrary to principle and completely overthrows the doctrine well established by an unbroken line of decisions of both this court and the Supreme Court of the United States that, in an unfair competition proceeding there can be no money decree for a complainant unless it appears that his business is injured and that defendant is palming off his goods as those of complainant. Nothing short of this will entitle complainant to a recovery, even though the defendant intends to injure complainant's business" (253).
>
> • • • • •
>
> "The principles of law now laid down by this court for the first time are so novel and of such far-reaching importance, and the misconduct charged against an institution having an unsullied and world-wide reputation, is of such a serious nature of that we owe it not only to the client and to ourselves, but to the court as well, to point out what we are convinced is a complete misapprehension by the court of the record and of the legal principles properly applicable thereto" (254).
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> • • • • •

"The question of the territorial extent of the business of the Wrigley Company and of the Larson Company was not considered, or passed upon in the District Court upon the final hearing of this case, and, for this reason, this court could not properly and it did not, in fact, pass upon that question on the prior appeal. Furthermore, the issuance of an injunction, 'universal in place', does not, as a matter of law, preclude the defendant from going into the territorial question when called upon to account for profits before the master. The defendant, in exemption of profits, may still prove his sales were made in territory where plaintiff and his goods were unknown" (255).

• • • • •

"By forbidding appellee from proving sales in markets never reached or intended to be reached by appellant and in which appellant and its gum were wholly unknown, the court holds appellee liable for profits on sales to purchasers who did not know of appellant and who sought only appellee's gum and procured precisely what they desired.

Appellee is merely offering to prove circumstances that would preclude any purchaser being misled into supposing that he was obtaining appellant's gum when buying appellee's, and that would affirmatively show that the purchasers were seeking appellee's gum and that there was no palming off" (271).

• • • • •

"Evidence serving to show 'that purchasers could not have been and were not, in fact, deceived concerning origin and did not buy through any misapprehension, cannot be excluded from the pending accounting merely because evidence of that character might have been pertinent at the original trial as bearing upon the right to an injunction or accounting; it is sufficient that it is relevant to the determination of the profits defendant has diverted from plaintiff by reason of deception concerning the origin of the goods" (272).

• • • • •

"The court, we respectfully submit, has failed to distinguish between the evidence required to justify an injunction and reference to the master for an accounting, and that which is pertinent in determining the recovery upon an accounting, although that highly

important distinction is repeatedly recognized, as shown by the many decisions to which reference is herein made. To justify the injunction plaintiff need only prove his right to the mark or color scheme and a likelihood that defendant's use of it will confuse purchasers into accepting defendant's for plaintiff's article. The recovery on the accounting, however, is dependent upon the extent to which the purchasers have been misled concerning origin. It is definitely settled by numerous decisions herein considered that the presence of marks identifying the article with defendant's manufacture and relied upon by the purchasers as distinguishing it from plaintiff's, is not only entitled to weight, but is often controlling in ascertaining profits, and may even exclude all relief.

It is no answer to resort to the rule of 'the law of the case' and state, as did this court, that by directing the issuance of 'an injunction', now said to have been intended to be 'universal in place', this court adjudicated the territorial issue not only with respect to the injunctional relief to be granted, but also with respect to the accounting feature. The Supreme Court has decided squarely to the contrary."

• • • • •

"And although there is a complete absence of proof that all or any Doublemint sales were deceptive, yet, this court, now, in effect, says that appellee may not show that it made some sales of the Doublemint package in territory where appellant was unknown and where, therefore, the sales could not have been fraudulent" (298).

• • • • •

"If, within the few months that intervened before Wrigley's Doublemint gum was put upon the market, any part of the trade purchasing such gum could possibly have been misled into supposing it was made by the Larson Company in spite of the fact that it bore conspicuously the name 'Wrigley's', it certainly cannot be conclusively presumed on an accounting, so as to shut out all evidence to the contrary, that all purchasers in all parts of the world, under all circumstances, were thus misled, especially those living in territory where neither appellant's name nor any of its products had ever been heard of" (306).

• • • • •

"We further respectfully submit that the territorial limitation issue was not adjudicated by this court upon the prior appeal; that no such issue was then presented to, considered or decided by this court; that the decree of this court ordering the issuance of an injunction, even though the injunction intended was a universal injunction, nevertheless did not determine that on the accounting appellee could not show the places where no confusion in fact, had yet developed. The injunction looked only to the future. If universal as to place, it determined, at the most, that universal confusion might develop, but it did not determine that there had been actual, universal confusion. Actual confusion, alone, can give rise to a cause of action for profit; whereas, mere likelihood of confusion in the future is sufficient ground for the injunction. The two issues are, manifestly, totally distinct.

We, therefore, submit that it is manifestly erroneous for this court to now hold that the territorial limitation issue was concluded or adjudicated so far as respects the accounting (which deals only with past actual confusion), merely because the court is now of the opinion that on the prior appeal it ordered a universal injunction, which deals only with possible future confusion" (360-361).

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No. 603

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1927.

L. P. LARSON JR. COMPANY,
Petitioner,

vs.

WM. WRIGLEY JR. COMPANY,
Respondent.

BRIEF AND ARGUMENT IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

and

OF MOTION TO AMEND DECREE.

CHARLES H. ALDRICH,
Solicitor and of Counsel for
Petitioner, L. P. Larson Jr. Co.

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BARNARD & MILLER PRINT, CHICAGO

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BRIEF AND ARGUMENT IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI AND OF MOTION TO AMEND DECREE.

STATEMENT OF FACTS.

In October, 1911, the Wrigley Company began its attacks upon the Larson Company which had shortly before commenced the manufacture and sale of chewing gum. In its bill filed in the then Circuit Court of the United States it gave a wholly false history of its package or trade dress, as has been established in this record, and as has been admitted by its president, Wm. Wrigley, Jr., as a witness and in answer to interrogatories propounded to him and which he was compelled to answer by order of court in a subsequent suit brought against the Larson Company in June, 1915. The Wrigley Company obtained a restraining order upon filing its bill in 1911; the Larson Company changed its dress, hoping to avoid litigation, but finding that the Wrigley Company, notwithstanding such

change of dress, had in the pendency of the suit an effective weapon of oppression to warn customers and circumscribe the growth of its trade, determined to put the cause at issue and fight it out. In June, 1915, the Wrigley Company brought another suit against the Larson Company; the suit in 1911 alleged that the Larson Peptomint brand in its color scheme for its dress infringed the Wrigley Spearmint dress; the 1915 suit alleged that the Larson Wintermint dress infringed both the Wrigley Spearmint and its Doublemint dress, and falsely averred that the Doublemint was prior in use to the Wintermint dress of the Larson Company The Larson Company filed a counterclaim in the later suit, averring its priority over Doublemint, that full notice to the Wrigley Company had been given, that these suits were wantonly brought to injure it in its trade, etc.

These suits were consolidated by order of court and tried before Judge Anderson, who dismissed both the original suits filed by the Wrigley Company for want of equity, and likewise the counterclaim of the Larson Company for the reason that in his view there was no confusion proved between the Wintermint and Doublemint dresses. Both parties appealed from this decision of the trial judge, and the action of the court below was affirmed by the Circuit Court of Appeals as to the dismissal of both of the bills filed by the Wrigley Company, and reversed as to the dismissal of the counterclaim,—*Larson Co.* v. *Wrigley Co.*, 253 Fed. 914 (C. C. A. 7th). The Wrigley Company sought certiorari from this court on the dismissal of the bill filed in October, 1911, which was denied. (248 U. S. 580.)

The decree of October 14, 1918, was entered after the attempt was made to substitute a bogus package by the then counsel for the Wrigley Company, and the taking of evidence was begun. It developed that in January, 1916,

after the consolidated causes were at issue, a Canadian corporation had been organized to which the defendant Wrigley Company had conveyed its factory at Toronto, Canada, and all its property of every kind in the Dominion of Canada, including its trade names, trade rights, trade dresses, etc., for the capital stock of the newly formed company, consisting of $500,000, par value, preferred stock, and $2,000,000, par value, common stock. The common stock was distributed to the Wrigley, defendant, shareholders, on the basis of five shares of the Canadian common for each share of the Wrigley defendant owned. The Canadian company continued the use of the infringing dress enjoined by the decree of October 14, 1918, until October 19, 1921. The Larson Company moved to extend the accounting to require the defendant Wrigley Company to account for the infringing acts of this Canadian company, which it owned and controlled. The Wrigley Company contended it neither was obliged to account for the new company's acts, nor for its own acts in the United States where Larson had not an established trade, and to show the comparatively small trade of the Larson Company, asked and was granted leave by the master, over the objections and exceptions of the Larson counsel, to examine as a witness L. P. Larson, Jr., president of the Larson Company, and his company's books for that purpose. After more than a year had been spent in this non-jurisdictional manner, upon advice of his counsel the witness declined to answer further questions or furnish further material from his books, and such proceedings were taken as were necessary to bring the questions thus raised, viz., the right to compel the defendant to the counterclaim to account for the acts of its Canadian company and to compel Mr. Larson to answer as to the extent of his company's business, both in the United States and in foreign countries, to the

attention of the Hon. George A. Carpenter, district judge, who ruled that the questions must be answered, and that he would not interfere with the discretion of the master, whereupon, in behalf of the Larson Company, an appeal was prayed for and granted to the Circuit Court of Appeals, Seventh Circuit, and at the same time an alternative order was sought and obtained upon the said District Court to show cause why he should not obey the mandate of said Court of Appeals following its opinion as reported in 253 Fed. 914; this led to the decision in 275 Fed. 535, sustaining the Larson Company in all respects and making clear to the District Court the scope and extent of the decree entered under its former mandate, and that until changed or reversed there should be no more "excursions".

The counsel for the Wrigley Company filed a petition for rehearing of 113 pages, in which they fully admitted that the court had awarded the Larson Company all profits arising from the manufacture and sale of the Doublemint gum, wherever made or sold, and without respect to whether the Larson Company had entered the market where sold; that it was adjudged a forestaller, a self-appointed agent of the Larson Company, and wherever it sold Doublemint gum it was selling for Larson's account. We have filed with the petition for certiorari herein some of these admissions, marked "*Exhibit D*", to which we beg leave to refer. The master entered the order against the Wrigley Company, defendant, to file the account as to the profits of the Canadian Company, and sustained the motion of the Larson counsel to strike all the Larson testimony so taken as taken without jurisdiction on the part of the master.

We do not here refer to the acts of malice, oppression, dishonesty, forestalling, false oaths knowingly made, etc., referred to by the court in the course of these two opin-

ions, or in the discussion of the case at the bar, as the character and purposes of the Wrigley Company are fixed by these decisions, and will, as we assume, remain so fixed. Upon the hearing before the master many other acts of the same character were committed which surpass in baseness in their totality anything we have ever found reported in a civil case.

The hearings were resumed before the master and resulted in a recommendation by such master that a decree be entered in favor of the Larson Company and against the Wrigley Company, for $2,860,083.66, with 6 per cent interest thereon from November 12, 1918, the end of the accounting period.

The Wrigley Company took exceptions to this report, and in the District Court the amount recommended by the master was reduced to $1,384,649.48. The Larson Company filed no objections or exceptions to the master's report, stating that in the Court of Appeals it would move to amend the decree as herein prayed. Its counsel had overlooked the fact that the Court of Appeals had no jurisdiction to entertain such a motion after the term. The District Court's action is reported in 5 F. (2d) 731.

Both parties appealed from the action of the District Court and the Circuit Court of Appeals affirmed the District Court and made further deductions. Petitions for a rehearing was filed by both parties, which were overruled August 30, 1927. The decision of the Circuit Court of Appeals is reported 20 F. (2d) 830.

The questions of public interest and importance, and which require the corrective action of this court, are seven in number, are summarized in our petition for the writ of certiorari, and are here reprinted as stating in the briefest terms we are able the action of the master and the District and Circuit Court of Appeals, and wherein the

decision reached in each instance is in conflict with prior decisions of this court, and we pray that this summary may be taken as part of our statement of facts.

The writer of this brief submitted to the District Court the draft of the decree of October 14, 1918, and which was entered, in which the Wrigley Company was allowed credit for such proportion of overhead, advertising and other proper expenses as the Wrigley profits on the manufacture and sale of Doublemint bore to the profits on all other gums manufactured by the Wrigley Company and which he now seeks to have amended by striking this provision. He was then seeking to have the Wrigley Company held liable as a forestaller or constructive trustee, but did not then know the full extent of its offenses nor the depths to which it would descend in prostitution of the court's processes. The disclosures on the hearings before the master, and other matters which we sought to prove, make it entirely proper, as we submit, to make this motion to amend the decree in this court which we mistakenly expected to submit to the Court of Appeals. We have come to believe that in the administration of equitable remedies where public interests or questions of public policy are involved, the act or mere oversight of an individual is of little or no importance, and do not stay the hand of the court. It was so held in Illinois where the question of *in pari delicto* was urged against the party seeking relief and where a question of public policy was involved. *Dunbar* v. *American Telephone Co.*, 238 Ill. 456, 491, 492.)

SUMMARY OF POINTS UPON WHICH THIS APPLICATION FOR WRIT IS BASED WITH REFERENCE TO BRIEF AND ARGUMENT.

I.

The writ of certiorari is sought because the decree under which the accounting was had prescribed the rule that the master "should ascertain the profits, if any, accruing to said company from the sale of Doublemint, as contradistinguished from the other brands of gum made by said company during the period, making proportionate deductions for overhead, advertising and other proper expenses."

The Wrigley Company had never kept any account with the several brands of gum manufactured by it.

It was agreed that Doublemint cost the same to manufacture as the Spearmint and Juicy Fruit, the other chief gums manufactured and sold by the Wrigley Company, was sold through the same agencies, at the same price, subject to the same discounts and other terms of sale as the other gums. (Master's Report VII—3207.) Obviously, therefore, when the total costs, sales and receipts were ascertained of all gums, and of Doublemint, the gross profits on Doublemint were ascertained, and the application of the Doublemint proportion of these sales to the sales of other gums to the total expenses, as shown by the books, would give the credits to which the Wrigley Company would be entitled under the directions of the decree. This would be a concise and simple matter. We have the testimony of the chief witness of the Wrigley Company and the witness who later attempted to deceive the courts by false and misleading statements, that this rule of adjusting such expenses on the proportionate basis is good accounting practice.

The allowances made by the District Court, and affirmed by the Circuit Court of Appeals, in the advertising account, contingent liability for United Profit Sharing coupons, tabulated page 16 of the Petition filed herewith, are in total disregard of the terms of the decree, and therefore amount to gifts to the Wrigley Company without jurisdiction on the part of the court to make such gifts.

We insist that neither the master, the District Court, nor the Court of Appeals could vary this accounting or its methods or extent, while the decree remained unchanged.

The action of the master was practically, as he states, in accord with these contentions. (VII—3210.)

That all the power and jurisdiction exercised by these courts must be within the terms of the decree and authorized thereby, is established by the decisions cited in Number I of the brief filed herewith, page 15, and it is submitted that this departure requires the corrective action of this court, both in the public interest and that of uniformity of decision. It is not in the interest of public morals that subordinate tribunals should in defiance of the warrant under which they act make large allowances to a wrongdoer, strongly condemned as a forestaller, wilful aggressor, guilty of deceiving the courts, filing bills supported by a false oath, knowingly made (VII—3115, 3116), etc., nor are such allowances warranted by the decisions in equity nor in accord with the decisions in this court.

Brief, pp. 15 and 16; Argument, pp. 36-42.

II.

The statement of Mr. Stanley that the division of expenses on the proportionate basis prescribed by the decree heretofore referred to is good accounting practice, is a method often applied in this court.

The authorities cited in II of our brief, p. 16, are in conflict with the allowances of the District Court and the Circuit Court of Appeals, and furnish an additional reason why in the interest of uniformity of decision the writ should be allowed.

It is suggested that if the Wrigley Company had any *good* reason to think that the proportionate rule prescribed by the decree would result in making its credits against the gross profits too small, that it should have applied to the proper court to modify the decree. A few sentences of Mr. Stanley's testimony quoted in our supporting brief show why the defendant adopted this course.

Brief and Argument, p. 41.

III.

In this division of our brief and argument we submit that the master's findings upon conflicting testimony and the credibility of witnesses, or so far as there is any testimony consistent with the master's findings, must be treated in the District Court as unassailable.

This proposition has been stated specifically by this court and in other cases here cited language equivalent to to this has been used, as when such a finding has been compared to the verdict of a jury, not to be disturbed except for reasons as strong as would justify the setting aside of a verdict. The only exception to this rule relates to cases involving constitutional questions and questions of public policy.

The District Court violated this rule in every change it made in the master's report, and the Circuit Court of Appeals did likewise in affirming each such change made by the District Court, and likewise in the changes made by it. This again calls for the issue of the writ in the interest of uniformity of decision.

Brief and Argument, p. 16, 26-31.

IV.

The books of the Wrigley Company were so kept that there could be no separation of the United Profit Sharing coupons issued during the accounting period and those issued after the end thereof. Both the redemptions and the contingent liability for those unredeemed must be calculated upon the totals and without regard to their date of issue. During the accounting period these coupons were used with the three brands,—Spearmint, Juicy Fruit and Doublemint. After the expiration of the accounting period they were used with three other brands of gum made and sold by the Wrigley Company, making six in all. And during a part of the later period the number of coupons issued with each box sold was increased. The proof showed that based upon the Wrigley experience to the date of the close of the evidence in this case, the allowance of 33⅓ per cent, or $98,580.79, on account of Doublemint's share of contingent liability for unredeemed United Profit Sharing coupons, as made by the master, would not be reached for over 45 years. This allowance was far beyond Doublemint's proportion based on Doublemint's sales or profits as prescribed by the decree. And yet, the District Court added to this sum the further one of $64,715.60 as its guess based upon the experience of others in other lines of business, and to this the Circuit Court of Appeals has added the further sum of $86,358.64 on the same basis.

The Larson Company is in no position to object to the allowance made by the master, as it filed no exceptions to his report. Had it taken exceptions thereto it is submitted that no allowance for redeemed or unredeemed coupons could be made. It has and does object to these additions made by the District Court and the Circuit Court of

Appeals, and submits to the court that such additions are in direct conflict with the principles well established with respect of confusion and clearly stated by this court and

Brief and Argument, pp. 17, 18, 31-36.

V.

The decisions of the Court of Appeals, 253 Fed. 914, 275 Fed. 535, and the decision here sought to be reviewed on the accounting part thereof, have established the fact that the Wrigley Company in both its attacks upon the Larson Company through the courts was a willful trespasser and forestaller, actuated by a desire to keep the Larson Company small, to clip its wings, limit its trade, etc.; that in the prosecution of these ends it has been guilty of deceiving the court, using bills supported by false oaths knowingly made, etc., and that because of such conduct it must be treated as Larson's agent, selling Larson's gum, and as such liable to account to Larson for the profits on all Doublemint gum, wherever sold. This is only applying old and well established principles as *agent de son tort,* or constructive trustee, to the relations of the Wrigley Company towards the Larson Company.

The master awarded interest on the award at the rate of 6 per cent per annum from the end of the accounting period, November 12, 1918, to the date of the entry of the decree. This was changed by the District Court to the date of the master's report, November 13, 1923, thus deducting from the master's finding five years' interest.

If an honest trustee or agent by appointment would be charged with interest upon accounting with his principal from the date when he should have paid, it surely cannot be the law that an agent or trustee of the adjudicated character of the Wrigley Company in this cause should be exonerated from such payment.

We have in our brief and argument, pp. 18, 19, cited the authorities showing that the exception of bad conduct, willful trespass on the part of the defendant constitutes an exception to the purely artificial rule that ordinarily interest upon unliquidated demands only runs from the date of the master's report.

We submit that these cases show clearly that this distinction has been fully realized and established by decisions of this court, and no such anachronism as that shown by this decision exists, and we therefore seek its correction both on grounds of public policy and in the interest of uniformity of decision.

VI.

The master and the District Court both disallowed the claim of the Wrigley Company that it should have credit for Doublemint's share of the income and excess profits taxes paid by it during the accounting period.

The Circuit Court of Appeals reached a different conclusion and allowed on this account as a credit to the Wrigley Company the sum of $888,276.52, or over $500,000 more than the Wrigley Company claimed in its filed account.

We have filed as an exhibit to our petition herein, for the convenience of the court, a report of Messrs. Touche, Niven & Co., public accountants, addressed to the writer, showing the results of this allowance in the inequalities of tax burdens resting upon the Wrigley Company and the Larson Company, respectively.

The court will observe that Larson Company never received any part of this money, and the constructive receipt imagined by the court for the purpose of working out this wholly novel and hitherto unheard-of method deprives the Larson Company of the rights given by the statute re-

ferred to (Secs. 327 and 328); nor has the Wrigley Company ever acquiesced in the decree rendered against it. As shown in our brief and argument, pp. 19, 48-54, the statutes, regulations and decisions in the department require recognition of liability, by writing off the amount thereof, whereupon the Wrigley Company has credit to the amount adjudicated against it in its next year's taxes; while the Larson Company, under the law, would return the amount received from such payment in the year received, and pay taxes thereon to the United States. The law has never recognized any of the vicarious methods of receipt, payment, acquiescence, etc., created by the court.

It is submitted that in the public interest in the administration of these laws, and also of public morals, and also in uniformity of decision, this court should correct this extraordinary action by the court in favor of a wrongdoer of such character.

Such decision is in hopeless conflict with this same court's decision in *Jackson* v. *Smietanka*, 272 Fed. 970 (C. C. A. 7th).

VII.

The Wrigley Compay, after its Doublemint bill filed June 15, 1915, had been answered and a counterclaim filed by the Larson Company, transferred its factory in Canada and all its property of every kind there situated, including trade-marks, trade names, trade dresses, etc., to a Canadian corporation, taking in payment therefor $500,000, par value, preferred stock, and $2,000,000 par value, common stock. The common stock was distributed as a stock dividend to the defendant's shareholders on the basis of five shares of the Canadian Company to each share of the Wrigley Company stock.

The Canadian Company was controlled by the Wrigley Company and its shareholders.

The shareholders and officers of the two companies are shown in the record. (X—4095-4097.)

The Canadian Company continued the use of the infringing dress until October 19, 1921.

Upon motion by the Larson Company the master extended the accounting by the Wrigley Company to include the profits, if any, made by the Canadian Company. It was not sought to make the Canadian Company liable, but to hold the Wrigley Company, defendant to the Larson Company's counterclaim, liable. This motion had led primarily to the decision of the Circuit Court of Appeals reported 275 Fed. 535, and which had held in accord with the contention of the Larson Company.

It is our contention that neither the District Court nor the Circuit Court of Appeals had any right or jurisdiction to hold otherwise after that decision, and such action by them raises questions which require that the writ prayed for issue herein.

We cite some of the cases decided by this court sustaining our contention in this respect.

Brief and Argument, pp. 20-23.

We file (Exhibit D, pp. 59-62, to the petition for certiorari) quotations from the petition for a rehearing filed by counsel for the Wrigley Company in the case decided in 275 Fed. 535, and submit that counsel are not permitted now to assert the contrary.

The cases so holding are cited, p. 23.

This rejection of the decision reached in 275 Fed. 535, by the Circuit Court of Appeals in the decision here sought to be reviewed is another reason why the writ prayed for should issue.

BRIEF.

I.

Neither the master, the District Court nor the Court of Appeals could vary this accounting or its methods or extent while the decree remained unchanged. The master's authority and that of the District Court is limited by the decretal order; any action attempted beyond such order is *coram non judice* and void.

2 Daniells Ch. Pl. & Pr. (5th Am. Ed.), 1297 and authorities there cited.

Rubber Company v. *Goodyear*, 9 Wall. 788, 801.

Metallic Rubber Tire Co. v. *Hartford Rubber Works*, 245 Fed. 860, 862.

Byerly v. *Sun Company*, 226 Fed. 759, 760.

DeLong Hook & Eye Co. v. *Francis Hook & Eye Co.*, 168 Fed. 898, 899.

Avery v. *Meikle*, 85 Ky. 431-435.

Shapiro v. *Engle*, 257 Fed. 854.

Gordon v. *Hobart*, 2 Story 243, 261.

Lonsdale v. *Moies*, 2 Cliff. 538, 543.

Larson Co. v. *Wrigley Co.*, 275 Fed. 535 (C. C. A. 7th).

The decree entered below was in effect the decree of the Court of Appeals, and it could not after the term and upon a rehearing change the decree as ordered.

Browder v. *McArthur*, 7 Wheat. 58.

Jackson v. *Ashton*, 10 Pet. 480.

Sibbald v. *United States*, 12 Pet. 488.

Sibbald v. *United States*, 2 How. 455.

Bank of the United States v. *Moss*, 6 How. 31.

Peck v. *Sanderson*, 18 How. 42.

Bronson v. *Schulten*, 104 U. S. 410.

Southard v. *Russell*, 16 How. 547, 570.

Stewart v. *Salamon*, 97 U. S. 361, 362.

Boyce's Executors v. *Grundy*, 9 Pet. 275, 290.

II.

The rule of dividing expenses or credits to infringer upon the proportionate basis of infringing business to other business has been often applied in the courts.

The Tremolo Patent Cases, 23 Wall. 518.

Hitchcock v. *Tremaine*, 9 Blatch. 385-387.

Corbin v. *Taussig*, 137 Fed. 151, 153.

Walter Baker Co. v. *Stack*, 130 Fed. 514, 520 (C. C. A. 7th).

In re Beckwith, 203 Fed. 45, 48 (C. C. A. 7th).

Pennsylvania Steel Co. v. *New York City*, 208 Fed. 747, 750.

Riverside Heights Orange Growers Association v. *Stebler*, 240 Fed. 703, 710 (C. C. A. 9th).

National Folding Box & Paper Novelty Co. v. *Dayton Paper Novelty Co.*, 95 Fed. 991, 993.

Winchester Repeating Arms Co. v. *American Buckle & Cartridge Co.*, 62 Fed. 278, 280.

and was approved by Mr. Stanley (II—758.)

III.

The master's findings depending upon conflicting testimony or upon the credibility of witnesses, or so far as there is any testimony consistent with the finding, must be treated as unassailable.

Westinghouse Electric & Mfg. Co. v. *Wagner Elec. Mfg. Co.*, 281 Fed. 453, 462 (C. C. A. 8th); certiorari denied 260 U. S. 744.

Armstrong v. *Belding*, 297 Fed. 728 (C. C. A. 2d); certiorari denied 265 U. S. 585.

Adamson v. *Gilliland*, 242 U. S. 350.

Dubourg St. Colombo v. *U. S.*, 7 Pet. 625.

Mason v. *Crosby*, 3 Woodbury & Minot, 258, 269, 270.

Cramer v. *United States*, 261 U. S. 219, 226.

Davis v. *Schwartz*, 155 U. S. 631, 632, 637.
Crawford v. *Neal*, 144 U. S. 585, 596.
Tilghman v. *Proctor*, 125 U. S. 136, 149, 150.
American Rotary Valve Co. v. *Moorehead*, 226 Fed. 202 (C. C. A. 7th).
Conklin Mining Co. v. *Silver King Coalition Mining Co.*, 230 Fed. 553 (C. C. A. 8th).
Wilson v. *Sands*, 231 Fed. 921 (C. C. A. 8th).

IV.

There was no separation and no means of separating the United Profit Sharing coupons issued with or redeemed from the sales of the Doublemint gum manufactured and sold during the accounting period from those issued with or redeemed from the sales of that brand of gum after the end of that period, viz., November 12, 1918; nor was there any way of separating the profit sharing coupons issued with Doublemint gum or redeemed from the sales of such gum before or after the end of the accounting period from identical coupons issued by the Wrigley Company with its sales of Spearmint and Juicy Fruit gum sold during the accounting period, or with the identical coupons issued with all Juicy Fruit and Spearmint gum and also three other brands of gum manufactured and sold by the Wrigley Company after the end of the accounting period.

This confusion was caused by the Wrigley Company, and therefore it was not entitled to the allowance of $64,715.60 made by the District Court, and the additional one of $86,358.64 made by the Circuit Court of Appeals in the opinion sought to be reviewed, in addition to the credit allowed by the master of $332,946.71 for the payments made for the redemption of profit sharing coupons on Doublemint gum, and of the further sum of $98,519.06 as Doublemint's share of the contingent liability for unredeemed United Profit Sharing coupons (VII—3230).

These allowances made by the master were not challenged by objections and exceptions by the Larson Company, but the additions thereto by both the District Court and the Court of Appeals are challenged upon the authority of

Westinghouse v. *Wagner*, 225 U. S. 604, 619—622.

Western Union Tel. Co. v. *Am. Bell Telephone Co.*, 203 Fed. 785, 791 (C. C. A. 1st).

Coffield Motor Washer Co. v. *Wayne Mfg. Co.*, 255 Fed. 558 (C. C. A. 8th).

V.

It is submitted that there is no consideration of public policy or of the just application of equitable principles that will warrant the action of the District Court and the Circuit Court of Appeals in refusing to allow interest against such an infringer as the Wrigley Company has been in the three opinions of the Circuit Court of Appeals adjudicated to be, only from the date of the master's report instead of from the end of the accounting period. We insist that the excuse of the District Court that because the Larson Company elected to recover profits instead of damages, that to allow interest would be an addition to the profits and hence not warranted, is fanciful,—not to say childish,—and unwarranted by reason or well considered authority; that interest is the fruit of the tree and is always a proper recompense for withholding profits by a self-appointed agent, agent *de son tort*, a constructive trustee, or whatever character is given the wrongdoer by the court of conscience to work out the ends of justice.

Such is the clear logic of the following decisions:

Tilghman v. *Proctor*, 125 U. S. 136, 160.

Mowry v. *Whitney*, 14 Wall 620, 653.

B. F. Goodrich Co. v. *Consolidated Rubber Tire Co.*, 251 Fed. 617, 624 (C. C. A. 7th).

Malleable Iron Range Co. v. *Lee*, 263 Fed. 896, 902, (C. C. A. 7th).

Armstrong v. *Belding Bros. Co.*, 297 Fed. 728, 732 (C. C. A. 2nd).

Littlefield v. *Perry*, 21 Wall. 205, 230.

Cosolidated Rubber Tire Co. v. *Diamond Rubber Tire Co.*, 226 Fed. 455, 463.

National Folding Box & Paper Co. v. *Dayton Paper Novelty Company*, 97 Fed. 331.

Spalding v. *Mason*, 161 U. S. 375, 395-396.

VI.

The Wrigley Company was not entitled to its accounting with the Larson Company to any credit on the income and excess profits taxes paid on the portion of the business known as Doublemint business prior to acquiescence by it that such business was Larson business, as held by the courts, and the Larson Company cannot be charged with such income and excess profits taxes until it has received the proceeds of such invasion by the Wrigley Company of its rights.

The action of the Circuit Court of Appeals with reference to these taxes is in violation of statute, regulations and decisions.

Cumulative Bulletin July-December, 1922, p. 413.

It is well established that a re-enactment of a statute by Congress, without change, which has received a certain construction, whether judicial or departmental, is an adoption by Congress of such construction.

Trumbull Steel Co. v. *Routzahn*, 292 Fed. 1009, citing *Sewing Machine Companies* case, 18 Wall. 553, 584.

Kepner v. *United States*, 195 U. S. 100.

United States v. *G. Falk & Bro.*, 204 U. S. 143.

United States v. *Cerecedo Hermanos y Compania*, 209 U. S. 337.

Vide also:

Cumulative Bulletin IV—2, p. 154.
Office Decision 1141 C. B. 5, p. 134.
Regulation 45 (1920 Edition), Art. III.

VII.

The master had power and jurisdiction when the Wrigley Company made its fifth application to extend the time within which it should file an account of the profits of the Canadian Company organized after the cause was at issue, and owned and controlled by it, to make it a condition that such extension should not delay the accounting of the Wrigley Company elsewhere, and that he would proceed to final hearing in the main cause.

Rules 60 and 62 prescribed by the Supreme Court.

The Wrigley Company in accepting delay sought for were bound thereby.

McKain v. *Mullen*, 65 W. Va. 558, also reported 29 L. R. A. (N. S.) 1, 37;

the note to this case as reported in 29 L. R. A. (N. S.) is sufficient to demonstrate that a litigant is required to observe good faith, and that counsel, seeking to prolong the litigation should not have bargained with the master but should have applied to the District Court to delay his report until the Canadian account could be taken.

L. P. Larson Jr. Co. v. *Wm. Wrigley Jr. Co.*, 275 Fed. 538.

2 Daniells Ch. Pr., star page 1296 (5th Am. Ed.) 1296.

Schwarz v. *Sears*, Walker's Ch. Rep. 19.

Suydam v. *Dequindre*, Walker's Ch. Rep. 23.

Ward v. *Jewett*, Walker's Ch. Rep. 45.

Emerson v. *Atwater*, 12 Mich. 314.

Tyler v. *Simmons*, 6 Paige Ch. Rep. 127, 131.

Douglas v. *Merceles*, 24 N. J. Eq. 25.

Hall v. *Westcott*, 23 Atl. 25.

Hooker, Borson & Mitchell Co. v. *Hooker, et al.*, 95 Atl. 649.

Shapiro v. *Engle*, 257 Fed. 854-856.

Walker's Patented Pivoted Bin Co. v. *Miller*, 146 Fed. 249-252.

Rollman Mfg. Co. v. *Universal Hardware Works*, 229 Fed. 579, 581.

We have cited these cases as in effect holding that the Wrigley Company was not at liberty to procure the delay sought upon the understanding plainly evident from the record, or if with mental reservations on their part they expected to raise the question of the master's power, they could not experiment with the master's decision and await an adverse ruling by the master before applying to the court for directions in the premises.

In his opinion on this branch of the case the learned District Court said (5 F. 2d, p. 748):

> "The Wrigley Company objects to this division of the case, and insists that but one final decree shall be entered. It contends that the question of the responsibility of the defendant corporation for the acts of the Canadian corporation and its liability to account for the profits of that corporation was not submitted to the master under the order of reference. It contends, also, that upon the undisputed evidence in the record before the master, which has been reported to the court, the relation between the two corporations did not make the West Virginia corporation liable for the profits of the Canadian corporation, and that Larson Company's remedy for alleged unfair competition by the Canadian corporation is in a suit against that corporation."

There is further statement by the learned court to the same effect, and the conclusion is reached that as there is no evidence of fraud in the organization of the Canadian Company and therefore "there is no reason why the two corporations should not be regarded for the purposes of this litigation as distinct legal entities."

It is to be remembered that the decision in 275 Fed. 535, between these parties originated in the motion in behalf of the Larson Company to require the defendant Wrigley Company to file an account of the acts of the Canadian Wrigley Company taking over its properties in Canada, as heretofore stated, during the pendency of this case and after it was at issue. This was not based upon any contention that there was fraud in the organization of the Canadian Company, but upon the general principle of *lis pendens* and the idea of the District Court, approved by the Circuit Court of Appeals, that a defendant to a suit of this character may escape liability for all or a part of his infringement by conveyance of the property to another corporation *pendente lite*, and that with each such conveyance new parties must be made, even if the plaintiff is compelled to go to a foreign jurisdiction, is, as we submit, an innovation in the law which is so novel and startling that this court should issue the writ herein asked for, that it may be once and for all time determined if the counsel for the Wrigley Company are entitled to have written into the next edition of the report of this case or in your decision thereon, the following paragraph of syllabus:

> "15. *Infringement Made Easy.* A corporation against which a suit is brought for alleged infringement can escape the results of its infringement from the date of its transfer to another corporation of its infringing business, even though it takes payment for such transfer in the stock of the new corporation and the officers of the infringing corporation constitute a majority of the board of directors of such new corporation, and the new corporation continues the infringement."

We do not assume that any extended argument on this proposition is necessary or proper, and submit that such a conclusion is irreconcilable conflict with the federal decisions and statements from accepted authorities, and should be corrected by the prompt action of this court.

McCaskill Co. v. *United States*, 216 U. S. 504, 514, 515.

Linn & Lane Timber Co. v. *United States*, 196 Fed. 593, 598-599; (affirmed 236 U. S. 534).

Merriam v. *Saalfield*, 190 Fed. 927 (C. C. A. 6th).

17 Ruling Case Law, 1031-1033, Sub. *Lis Pendens*.

We have referred to these few authorities notwithstanding the fact that the question was finally determined for the master, District Court, and the Circuit Court of Appeals itself, except upon a rehearing or reversal, in the second decision in this case. (275 Fed. 535.) And that counsel for the Wrigley Company in the petition for rehearing filed in said cause repeatedly stated that such was the court's decision and which statements they are not now at liberty to controvert. (*Vide* Exhibit D, filed with petition herein.)

Sullivan v. *Colby*, 71 Fed. 460, 466 (C. C. A. 7th).

Davis v. *Wakelee*, 156 U. S. 680, 691.

Railway Co. v. *McCarthy*, 96 U. S. 258.

Sun Co. v. *Vinton Petroleum Co.*, 248 Fed. 623 (C. C. A. 5th).

Texas & Pacific Ry. v. *Abilene Cotton Oil Co.*, 204 U. S. 426, 435.

Gratz v. *McKee*, 9 F. (2d) 593, 596 (C .C. A. 8th).

VIII.

The willful trespasser upon another's property, or the fraudulent grantee thereof, or the malicious or fraudulent invader of another's rights of property, as the forestaller, is not entitled to reimbursement for his outlays upon the property so seized or acquired, upon long settled principles of public policy, which deny all profit to the wrongdoer from his illegal conduct and refuse to allow the courts to indemnify him against loss from his wrongful actions:

Woodenware Co. v. *United States,* 106 U. S. 432, 35.

Pine River Logging Co. v. *United States,* 186 U. S. 279, 293, 294.

Railroad Co. v. *Soutter,* 13 Wall. 517, 523, 534.

Guffey v. *Smith,* 237 U. S. 101, 119.

Grant v. *Fletcher,* 283 Fed. 243.

Big Seske Oil Co. v. *Cochran,* 276 Fed. 216 (C. C. A. 9th).

Lynch v. *Burt,* 132 Fed. 417, 432 (C. C. A. 8th).

Burt v. *Gotzian,* 102 Fed. 937, 947 (C. C. A. 8th).

Sherman Saving Loan Soc. v. *Tull,* 136 Fed. 1 (C. C. A. 9th).

Commonwealth Finance Corporation v. *McHarg,* 282 Fed. 560, 589, (C. C. A. 2nd).

Rubber Company v. *Goodyear,* 9 Wall. 788, 804.

Hanover Milling Co. v. *Metcalf,* 240 U. S. 403, 415.

United Drug Co. v. *Rectanus Co.,* 248 U. S. 90, 101.

Pan American Co. v. *United States,* 273 U. S. 456.

The Teapot Dome case, decided October 10, 1927.

ARGUMENT.

We discuss the questions in the order they are stated in the summary reprinted herewith. This decree, which is made a part of the petition for certiorari herein, directed the master as follows:

> "And this court doth further order and decree that the cause be referred to Charles B. Morrison, one of the masters of this court, with all the usual powers of a master in such accountings, to take an account of all the gains and profits of Wm. Wrigley, Jr. Company to it accruing or arising from the manufacture and sale of its Doublemint gum in the dress hereinbefore enjoined, from its first sale on July 28, 1914, to the date of the entry of this decree and such further time, not exceeding ninety days, as may be necessary to comply with this decree, and until compliance therewith.
>
> The said master shall have power to employ chartered accountants to examine the books of Wm. Wrigley Jr. Company for the period covered by the decree. If he desires so to do, he shall select persons who have no interest in the questions in controversy between the parties herein, to whom he shall administer an oath to impartially and faithfully examine all books, orders, shipments, reports, letters and files of said Wm. Wrigley Jr. Company, *to ascertain the profits, if any, accruing to said company from the sale of Doublemint as contradistinguished from the other brands of gum made by said company during the period, making proportionate deductions for overhead, advertising and other proper expenses*, and report the facts for each year embraced in the terms of the decree."

The meaning and intention of the court was made plain in its later opinion in the same case, reported in 275 Fed. 535.

We have italicized the words upon which our first proposition is based. The decree was explicit in its directions that the proportionate basis should be used. It was not used and no additional allowance for account of "adver-

tising" could have been made without a rejection of the terms of the decree. The courts were without jurisdiction to reject this clause.

The authorities are cited in I and II of the *Brief*. The purpose of seeking to build up a separate account of Doublemint expenses and without regard to amounts expended on Spearmint and Juicy Fruit is found in Mr. Stanley's statement (V—2395) * * *:

> "YON CAN MAKE UP AN ADVERTISING ACCOUNT JUST AS YOU PLEASE AND INCLUDE WHAT YOU WANT AND EXCLUDE WHAT YOU WANT." (The emphasis is ours.)

III.

The master was engaged in taking testimony under this reference from October 16, 1918, to and including June 11, 1923. (VII—3203.) He found the gross profits of the Wrigley Company in the manufacture and sale of Doublemint gum in its infringing dress during the accounting period, which was July 28, 1914, to and including November 12, 1918, to be $5,152,689.32, and the net profit $2,860,083.66. He awarded interest to the Larson Company from the end of the accounting period at six percentum per annum. The District Court reduced this finding to $1,384,649.48, and instead of allowing interest from the end of the accounting period, only allowed interest from the date of the master's report, November 13, 1923.

In making these changes in the findings of the master, both the District Court, whose decision upon the exceptions taken to the master's report is found in (*Wm. Wrigley Jr. Co.* v. *L. P. Larson Jr. Co.*, 5 Fed. (2d) 731, 741) and the Circuit Court of Appeals in the opinion made a part of the petition for certiorari, 20 F. (2d) 830, have not observed the limitations placed upon them by the decree or by this court in changing the conclusions of the master. They have both changed such conclusions in disregard of the terms of the decree, when the master's conclusions were sustained by the

clear weight of the evidence, where there was no credible evidence to sustain the court's action, and where in many cases the court's action amounted to a gift to the Wrigley Company, found by all the four decisions referred to (viz., 253 Fed. 914; 275 Fed. 535; 5 Fed. (2d) 731, including the present opinion against which this petition and brief are directed, 20 Fed. (2d) 830) to be a wanton, wilful aggressor against the Larson Company, acting with the purpose to forestall the Larson Company, to clip its wings and prevent the growth of its trade and using, to attain these ends, such conduct as deceiving the courts, bills supported by false oaths, knowingly made, and other offenses against the administration of justice.

It is our contention that the master's findings of fact should not have been disturbed in the District Court or in the latest decision of the Court of Appeals, unless it is shown that the master had clearly fallen into a mistake or clearly abused the power confided to him as it was not. We base this contention upon the decisions cited in Paragraph III of our brief, with all and each of which we contend that the action of the Court of Appeals in the case at bar in affirming the District Court, 5 Fed. (2d) 731, 741, and in making additional changes is in irreconcilable conflict.

We ask the court to note that in no instance did the District Court nor the Circuit Court of Appeals comply with the conditions under which the District Court claimed the right to vary the master's report. The District Court said: (5 Fed. (2d) 741):

> "Of course, the findings of both law and fact in the master's report should be taken as presumptively correct and should be followed unless an obvious error has occurred in the application of law, or a serious and important mistake has been made in the consideration of proofs." (Citing cases.)

The District Court did not state in what particular the master erred.

And the Court of Appeals, in the opinion of which we here seek review, said:

> "The award here in issue is so palpably and unquestionably ample to fully compensate Larson for any and all invasion of its rights, as to suggest no circumstances which invoke the court's discretion to enlarge it by allowance of interest back of the date of the master's report, a condition which, in our judgment, likewise forbids an interest rate above five per cent."

We quote this *ratio dicendi* as applied to a forestaller, wanton aggressor, acting from October, 1911, to the present as established by three decisions of the Court of Appeals "for the purpose of eliminating Larson as an actual or potential competitor", thrice adjudged entitled to "all profits", and the excuses found for giving the profits to the Wrigley Company without any attempt to show that the master's findings were not supported by the evidence and in strict accord with the terms of the decree.

We now turn to a consideration of some of the decisions of this and other courts with which this decision cannot be harmonized.

As illustrating the history and purpose of the master's office and the light in which the decisions should be read, we quote the following from the decision in *Mason* v. *Crosby* (C. C. U. S. 1847) 3 Woodbury & Minot, 258, 269, 270:

> "In respect to the exceptions themselves, most of them seem chiefly to rest on an impression that the court, when a master's report is returned, should retry and re-examine and decide on all the questions of fact, as well as law, raised before the master.
>
> But we regard the office of a Master in Chancery somewhat like that of a jury in the court of common law. Originally there were twelve masters in number, and their duties were not only limited, in the progress of time, to matters of fact, but chiefly to those of mere debit and credit, and computation of interest. 1 Spence, Eq. Jur.

When they have once decided on these facts, and no legal question is involved in them, their report should stand probably without amendment here, or without recommitment, unless reasons exist for either, as strong as will justify setting aside a verdict.

If there has been a clear mistake, or a palpable abuse of power, either of them ought to be corrected. But if the court should inquire act beyond that, as to matters of fact, the office of master would prove but little aid in the administration of justice—the court being compelled to go over all the facts again, and thus their labors be greatly and unnecessarily increased.

When a party has enjoyed one full hearing as to the facts involved in his claims of debt, credit, interest and kindred topics, there seems little justification for going into another, unless the master has clearly fallen into a mistake, or clearly abused the power confided to him. Without such a limitation, no prospect would exist of putting an end to litigation."

In the interest of brevity we content ourselves with mere citation and statement, reserving to a later brief, when the writ prayed for has been granted, a more extended discussion of the decisions, and the evidence in this case.

In *Dubourg St. Colombo* v. *U. S.*, 7 Pet. 625, Chief Justice Marshall reversed a decree and remanded a cause because a complex accounting had not been referred to a master. The reasons given by the court are illuminating.

In *Adamson* v. *Gilliland*, 242 U. S. 353, this court held that the conclusions of a master or judge who saw the witnesses, upon an issue depending upon conflicting evidence or upon the credibility of witnesses, or so far as there is any testimony consistent with the finding must be treated as unassailable, and reversed the decision of the Court of Appeals which had reversed the court below, because, as the Court of Appeals said, the testimony of the defendant and his witness sustained the defense beyond any reasonable doubt.

The principles of this case were sustained in *Cramer* v. *United States*, 261 U. S. 219, 226, and see:

Davis v. *Schwartz*, 155 U. S. 631, 632, 637.

Crawford v. *Neal*, 144 U. S. 585, 596.

Tilghman v. *Proctor*, 125 U. S. 136, 149-150.

American Rotary Valve Co. v. *Moorehead*, 226 Fed. 202 (C. C. A., 7th).

Conklin Mining Co. v. *Silver King Coalition Mines Co.*, 230 Fed. 553 (C. C. A., 8th).

Wilson v. *Sands*, 231 Fed. 921 (C. C. A., 8th).

Westinghouse Elec. & Mfg. Co. v. *Wagner Elec. Mfg. Co.*, 281 Fed. 453-462 (C. C. A., 8th); certiorari denied 260 U. S. 744.

Armstrong v. *Belding*, 297 Fed. 728 (C. C. A., 2d), certiorari denied, 265 U. S. 585.

We cannot here discuss, if we observe the brevity which the decisions of this court require us to practice in seeking this writ, the many clear and indisputable violations of the rule established by these decisions on the part of the district court and the court of appeals in its latest decision in this cause, which we undertake to show were both in direct conflict with the terms of the decree under which the master acted, but were so far unsustained by any credible evidence as to amount to "gifts" by the District Court and the Court of Appeals to the Wrigley Company and a denial of the terms of the decrees directed by the same court that the Wrigley Company should account for and pay all profits and the Larson Company should receive all profits arising from the manufacture and sale of Doublemint gum in the infringing dress from July 28, 1914, to November 12, 1918, wherever made or sold.

Some of these "gifts" deducted from the master's award are as follows:

Advertising	$1,055,407.52
Contingent liability for unredeemed United Profit Sharing Coupons (deducted by District Court)	64,715.60
(This action of the District Court was affirmed in latest decision of the Court of Appeals, and the latter court added thereto the further sum of	86,358.64
Interest on Capital invested in tangible assets.	259,120.54
Interest on Capital invested in patent rights..	45,260.79
Miscellaneous Income	45,708.01

We undertake to demonstrate to the court, when this writ is issued, and we have an opportunity to do so, that the conclusions of the master as to each of these items was sustained by credible evidence, and that he could not have reached any other conclusion upon the evidence heard by him under the terms of the decree, or the law applicable to such an accounting. That the deduction of these items from the award amount to *gifts* by the court to the Wrigley Company, and hence a denial to the Larson Company of the profits awarded to it by the court because of the wanton and unprincipled attempt to forestall and circumscribe the trade of that company.

IV.

In the increased allowances made by the District Court and later by the Circuit Court of Appeals on account of unredeemed United Profit Sharing coupons we have not only a disregard of the decisions of this court upon the effect to be given a master's report where the master has heard the evidence, looked into the eyes of the witnesses, observed their demeanor upon the stand, etc., but also a

clear disregard of the decisions of this court upon the rules applicable to confusion where the infringer has made no attempt to separate the profits on the infringing article from the total profits. The facts, stated as briefly as possible, are as follows:

The Wrigley Company commenced the use of United Profit Sharing Coupons at the beginning or soon after the beginning of the accounting period. During the accounting period those coupons were used on three brands of gum only, viz.: Spearmint, Doublemint and Juicy Fruit; no serial or key numbers, as the master denominates them (VII-3223), were used to separate the coupons issued in any one year from those of any other year; after the accounting period the Wrigley Company increased the use of the coupons by extending such use to three other brands, making six brands manufactured and sold by the company with which coupons were issued (VI—2644-2645); and during a portion of such period subsequent to November 12, 1918, the end of the accounting period, the Wrigley Company doubled the number of the 5-coupon issued with each box sold. (VI—2647.) The redemptions are found, from all coupons issued up to May 31, 1923, and the contingent liability calculated likewise upon the same basis, while in fact both should have been calculated only on the coupons issued during the accounting period; manifestly these facts worked to the increase of the redemptions and of the contingent liability of Doublemint in the estimates made.

In short, the Wrigley Company so conducted its business that confusion exists as the master found (VII—3224) no separation has been made or can be made of the actual redemptions of issues made during the accounting period, and no calculation has been made or can be made of the contingent liability on the issues made during the accounting period; hence, upon well accepted principles, no allow-

ance should have been made the Wrigley Company under this heading, and hence the District Court's addition of 5 per cent is unwarranted.

It is in fact a mere guess, based upon nothing, under changed conditions through the use of coupons on six brands of gum instead of three brands as used during the accounting period, the use of double-five coupons to a box during part of the period, and changed conditions after the accounting period; this guess is made in favor of a wanton, malicious transgressor which so conducted its business as to cause the confusion which the master so clearly pointed out that the action of the District Court and of the Circuit Court of Appeals amounts to a repudiation by these courts of the principles announced on the subject of confusion stated in *Westinghouse* v. *Wagner*, 225 U. S. 604, 619-622, and the following additional cases which illustrate and apply the well-known and heretofore unchallenged rule upon this subject. *Western Union Tel. Co.* v. *Am. Bell Tel. Co.*, 203 Fed. 785-791 (C. C. A., 1st); *Coffield Motor Washer Co.* v. *Wayne Mfg. Co.*, 255 Fed. 558 (C. C. A., 8th).

The figures adopted by the master and recommended by Touche, Niven & Co., will not be reached for over 45 years if the Wrigley redemptions increase only at the rate that they increased from December 31, 1918, to the date of the close of the testimony before the master, May 31, 1923, which we now proceed to demonstrate.

The cumulative percentages of all the U. P. S. coupons issued by the Wrigley Company from the time it first started the use of coupons up to the end of May, 1923, was 26.947%. (VI—2914.) This was testified by Mr. Stanley (7672) and was verified by Mr. Vincent of Touche, Niven & Co. At the end of February the percentage had been shown to be 26.8857%. (Wrigley Ex. 102-A, p. 7566.) (IX—8868.)

Mr. Vincent's figures making the corrections, which were accepted by the Wrigley Company, showed total redemptions 26.798%. (P. 7573.) (X—4330.)

Bringing the account down to May 31, 1923, gave a percentage of total redemptions to total issues of 26.947%.

The ratio of coupons redeemed to those issued at December 31, 1918, was 26.264%, and this percentage at May 31, 1923, was 26.947%, an increase for the four years and five months since December 31, 1918, of six hundred and eighty-three one-thousandths of one per cent (683/1000 of 1%) equivalent to an average of fifteen and one-half hundredths of one per cent (15.5 of 1%) per annum. At this rate of increase, it would require forty-five years before the redemptions reach the 33⅓% of the total issues. In other words, this point of 33⅓% would not be reached until August 31, 1964.

These figures prove that the addition of the extra five per cent made by the learned District Court was unwarranted by any evidence and does the rankest injustice to the Larson Company. If a court can in the teeth of such figures as these and in the face of such a finding as the master made and for such reasons as the master gave therefor, and where the evidence of confusion is indisputable, make such changes, he can without reason add to, or subtract from, any item found by the master.

We can find no warrant for the action of the Circuit Court of Appeals in not only affirming the action of the District Court, but in adding thereto the sum of $86,358.64 unless it is found in the sentence of the court's opinion, viz.:

> "The award here in issue is so palpably and unquestionably ample to fully compensate Larson for any and all invasion of its rights, as to suggest no circumstances which invoke the court's discretion to enlarge it by allowance of interest back of the date of the master's report, a condition which, in our judgment, likewise forbids an interest rate above 5 per cent."

The Larson Company filed no objections or exceptions to the master's report, but gave notice that at the proper time it would seek to have applied to the Wrigley Company, in view of its character as a litigant, as established by the adjudications of the courts in this case the principles of the following decisions of this and other courts:

Woodenware Co. v. *United States*, 106 U. S. 432, 35.

Pine River Logging Co. v. *United States*, 186 U. S. 279, 293, 294.

Railroad Co. v. *Soutter*, 13 Wall. 517, 523, 534.

Guffey v. *Smith*, 237 U. S. 101, 119.

Grant v. *Fletcher*, 283 Fed. 243.

Big Seske Oil Co. v. *Cochran*, 276 Fed. 216 (C. C. A., 9th).

Lynch v. *Burt*, 132 Fed. 417, 432 (C. C. A., 8th).

Burt v. *Gotzian*, 102 Fed. 937, 947 (C. C. A., 8th).

Sherman Saving Loan Soc. v. *Tull*, 136 Fed. 1 (C. C. A., 9th).

Commonwealth Finance Corporation v. *McHarg*, 282 Fed. 560, 589 (C. C. A., 2d).

We are therefore not in a position to object to the allowance made by the master of $98,519.06 on account of contingent liability for unredeemed United Profit Sharing coupons as shown by the report of Touche, Niven & Co., but are at liberty to object to the $64,715.60 added thereto by the District Court, and also the $86,358.64 superimposed by the Court of Appeals in its latest opinion.

We submit that the facts as to the issue of profit sharing coupons are in every respect as herein stated, and that the action of the district judge and the Court of Appeals cannot be reconciled with the language of this court in *Westinghouse Company* v. *Wagner Mfg. Co.*, 225 U. S. 604, at page 621. As we have stated, no allowance for such unredeemed coupons could have been properly made had exceptions been taken thereto by the Larson Company, and

these opinions of the District Court and the Court of Appeals, making these additions to an allowance by the master which itself would not be reached by the Wrigley Company until August, 1964, as measured by its own experience during the interval between the two examinations made of its redemptions, and that, too, when the company had extended the use of profit sharing coupons to six brands of gum instead of three only, as during the accounting period are unwarranted.

IV.

We have quoted the terms of the decree giving the master authority to employ chartered accountants "to ascertain the profits, if any, accruing to said company from the sale of Doublemint as contradistinguished from the other brands of gum made by said company during the period, making proportionate deductions for overhead, advertising and other proper expenses, and report the facts for each year embraced in the terms of the decree."

In accord with this decree the master found the proportion of Doublemint sales to all other sales of gum manufactured by the Wrigley Company during the several divisions of the accounting period prescribed by the decree. His finding was as follows (VII—3207):

	Total Sales	Doublemint Sales	Percentage of Doublemint to Total Sales
7/28 to 12/31/14.....	$ 3,522,732.30	$ 570,426.40	16.1927
1915	9,717,145.33	1,816,332.08	18.692
1916	12,482,342.87	2,049,964.85	16.4229
1917	15,713,657.84	2,348,003.49	14.9424
1/1 to 11/12/18	15,214,994.80	2,132,560.08*	14.016

NOTE: *The sales of Doublemint in the United States from October 5th to November 12th, inclusive, are not included, as the infringing dress was discarded in this country at October 4, 1918.

"The sales of Doublemint throughout the accounting period, $8,917,286.90, the manufacturing cost thereof, $3,764,597.58, and the gross profits, $5,152,689.32, given in the filed account, were accepted by the Larson Company as correct."

It was thus easy to comply with the terms of the decree in computing the deductions to be made from the gross profits for overhead advertising and other proper ex-

penses; but any computation under the terms of the decree as written would have shown a large indebtedness on the part of the Wrigley Company to the Larson Company, and this was not in accord with the determination of the Wrigley Company as stated by the officers and counsel of the Wrigley Company in the interview with Mr. Larson as set out in his affidavit answering Judge Carpenter's return to the order to show cause in the mandamus case. (VII—3073.) The Wrigley interests have never attempted to deny the truth of these statements by Mr. Larson.

In the Wrigley original filed account that company claimed a loss on its manufacture and sale of Doublemint gum of $286,238.30.

Mr. Stanley, who had charge of the Wrigley accounting and had special charge of the advertising account, had early testified that the proportional method prescribed by the decree was good accounting practice (II—758) and certainly it is a practice which has frequently been used in the courts, as will be seen by reference to the following cases:

The Tremolo Patent Cases, 23 Wall. 518.

Hitchcock v. *Tremaine,* 9 Blatch. 386-387.

Corbin v. *Taussig,* 137 Fed. 151, 153.

Walter Baker Co. v. *Stack,* 130 Fed. 514, 520 (C. C. A., 7th).

In re Beckwith, 203 Fed. 45, 48 (C. C. A., 7th).

Pennsylvania Steel Co. v. *New York City,* 208 Fed. 747, 750.

Riverside Heights Orange Growers Association v. *Stebler,* 240 Fed. 703, 710 (C. C. A., 9th).

National Folding Box & Paper Novelty Co. v. *Dayton Paper Novelty Co.,* 95 Fed. 991, 993.

Winchester Repeating Arms Co. v. *American Buckle & Cartridge Co.,* 62 Fed. 278, 280.

If we take the total advertising account as found by the master and apply the rule here stated, namely, the proportion of Doublemint sales to the total sales, which the master found averages for the accounting period 15.74 per cent (page 9 Master's Report VII—3207) the total credit to the Wrigley Company would be $1,070,109.51. This is without deduction for account of the institutional advertising in the prominence given the word "Wrigley's" or without any allowance for "good-will", which greatly increased during the accounting period.

The Touche, Niven & Co. report (Larson Exhibit 132) made this amount $1,017,183.59, which was arrived at by multiplying the advertising for each period of the accounting by the percentage of the Doublemint sales to the total sales of the same period.

And yet the District Court made an addition to the master's figures, viz., $996,127.45, which as the master states is reached by eliminating the institutional advertising, of practically the full amount for which the Wrigley Company should have credit, if as the decree directs his credit is based on the proportionate deduction to be based on the ratio of Doublemint sales to all sales of gum manufactured by the Wrigley Company.

We submit that the court had no right to change the terms of the decree, or the conclusion of the master who had seen and heard this witness; if, in the opinion of the counsel for the Wrigley Company they could establish a larger credit for the Wrigley Company by some other rule than the one prescribed by the decree, they should have objected to its entry, or if entered before they had finished their scheme to wipe out the admitted gross profit of $5,152,689.32 by extravagant claims as to advertising expense, they should have sought a modification of the decree. Certainly the District Court could not change the master's findings as to this advertising account, as a question of

law; he could not justly say the decree meant one rule as to "overhead" and "other expenses" and another thing as to "advertising" as an expense; nor as we submit could he on sound principles of construction hold that the word "proportionate" is in this decree a superfluous word and that it legally must be interpreted as though it were omitted and read: "making deduction for overhead, advertising and other proper expenses."

When the writ has issued in this case and we are at liberty to pursue in greater detail the manifestly false evidence given by Mr. Stanley in this attempt to build up this Doublemint account, we undertake to convince the court that the master was right in his conclusion as stated (VII—3210):

> "The space basis is sometimes the best method for dividing advertising, but where the volume, the details and the complexity of the accounts are so great as in this case, and the books and records were not kept with a view to that end, it is impossible to divide advertising cost with reasonable accuracy by this method.
>
> Without passing upon the question as to whether the decree directs the methods by which advertising shall be divided, the contention of the Larson Company has been substantially accepted as the most suitable method to do justice between the parties with the modification that the institutional advertising is amortized over a period of four years.
>
> A separation of institutional and brand advertising is made with reasonable accuracy in the manner following. An analysis has been made of display advertising done by the Wrigley Company as illustrated by photographic copies of advertisements bound in the transcript and by the seven books of advertising produced before the master and marked Larson's Exhibits 30 to 36, inclusive. The percentage of institutional found in each class of advertising has been determined and deducted from the total and the remainder has been divided among the brands advertised on the basis of their relative sales. While all samples of the different classes

of advertising may not have been before the master, those produced were sufficient in volume and so diversified in character as to be representative and enable accurate conclusions to be reached.

Doublemint benefited during the period by institutional advertising done during the period and the full value of such advertising was not on hand at the end of the period. Amortization gives effect to the diminishing value of institutional advertising and serves to charge against Doublemint the benefits Doublemint derived therefrom. Four years has been selected as a reasonable period over which the value of institutional advertising would extend. Doublemint's proportion of the amortized value falling within the period has been ascertained on the basis of Doublemint sales to total sales of advertised brands.

It may be said against the sales method that sales do not always respond in proportion to the advertising expended and especially where a new article or brand like 'Doublemint' is placed on the market. This contention could be advanced if the Wrigley Company had ceased to sell gum under the name 'Doublemint' at the close of the accounting period, but as it continued to use the name 'Doublemint', it is fair to assume from its experience with other brands that the returns on Doublemint will finally fully recompense it for the advertising cost. It is believed that by adopting the sales method Larson has been fully compensated for any value remaining in the name 'Doublemint' at the end of the period."

We will show that this witness made tables and prepared statements with the purpose of deceiving the master and concealing the truth, and finally when one of the Wrigley counsel, lacking the cunning which such a cause required, persisted in his effort to make the witness state that he had taken into consideration the cost of advertising the brands known as Spearmint and Juicy Fruit also, he said (V—2168): We quote the question of counsel as given in the original record:

"Mr. Lane: But in arriving at those figures you took into consideration the other material that is on the card?

A. Not a bit. We had nothing to do with Spearmint. We have not today even made any calculations as to the charge for Spearmint. Touche, Niven & Company in their report say that they cannot check our figures with the Spearmint figures. The balance which we have not taken for Doublemint is naturally applicable to all brands, but whether it is applicable to Spearmint or Juicy Fruit we have not attempted to find out. (6192) (V—2168.)"

And later when an attempt was made to induce the master to allow as Wrigley credits, all or a large part of the "Donations" (V—2395) Mr. Stanley said:

"Q. And when were they taken out of the advertising account and made a separate matter under the heading of donations?

A. They never have been taken out of the advertising account. They still are in the advertising account.

Q. Why is it, then, they were not included in your statement of total advertising in the different periods?

A. I really don't know why the payments for advertising for the different periods are made up. *You can make up an advertising account just as you please and include what you want and exclude what you want.*"

(The italics are ours.)

Finally, these actions by the District Court and the Court of Appeals in disregard of the terms of the decree and the conclusions of the master who heard the evidence, are not only opposed to the decisions of this court as to the effect of the master's decision upon controverted facts, but are clearly in violation of the principles of public policy applicable to such a litigant as the Wrigley Company has been adjudicated to be in these opinions of the Court of Appeals, as illustrated in the *Woodenware, Pine River Logging Co., Soutter, McHarg* and other cases, as well as the *Goodyear* v. *Rubber* Co., case.

In no other suit in equity have we found such severe condemnation of the conduct and base purposes of a litigant by the court, coupled with such tender solicitude that the wrongdoer shall escape the consequences of his wrong doing. For example, the master allowed the Larson Company the sum of $71,905.74 as Doublemint's share of income arising from the investment of profits, whether considered as invested in the gum business or otherwise. The District Court states that the total miscellaneous income is allocated in the proportion that the accumulated profits at the first of each calendar year bear to the total invested capital, excluding intangibles; accumulated Doublemint profits being considered as Doublemint's investment in the business; an allowance for $26,202.73 was made by the court, as being Doublemint's proportion of miscellaneous income. Thus the court decreased the master's allowance under this heading to the extent of $45,260.79, which action by the court is assigned by the Larson Company as error. (5 F. (2d) 747.)

The present item shows how dangerous it would be to follow the learned District Court in his pronouncement that he allows $26,202.73 only as against $71,905.74 allowed by the master. The first sum is taken from Wrigley Exhibit 92, Bennington 1, O. 103 (VIII—3795):

> "In the filed account the Wrigley Company credited an amount of $53,584.47 to Overhead Expenses in respect of Interest. This amount excluded Interest earned on Assets which were not included in the Invested Capital, on which an Interest charge of 7 per cent was taken up in the filed account.
>
> Touche, Niven & Company (p. 4) state that it would appear reasonable to include all Interest earned on money loaned, and in their Exhibit 'B', page 30, they very properly take credit for Interest excluded by the Company amounting to $100,413.08, as follows:

Wm. Wrigley Jr. Company, Ltd., Toronto	$ 11,958.75
Wm. Wrigley Jr. Company, Proprietary, Ltd., Australia	9,178.35
Wrigley, Ltd., London	24,509.67
Other Individuals and accounts	54,766.31
	$100,413.08

They do not, however, include interest earned on investment securities.

Marwick, Mitchell & Company (pages 109-111) state that under the Company's definition of Invested Capital the total credit for Interest should be $85,772.42, and also (page 68) show an additional credit of $1,575.32, or a total of $87,347.74.

In view of certain items being omitted in the filed account and also on account of the Wrigley Company now revising the composition of its Invested Capital, a new statement of Interest Received is submitted herewith.

This statement shows the credit on account of Interest to be $174,231.94, of which amount $26,202.73 is credited to Doublemint, as compared with $8,065.26 in the account filed, or an increase in Doublemint Profits of $18,137.47."

But subsequently Mr. Benington appeared upon the stand and testified as follows (7647-7648) (VI—2704):

"Mr. Lane then stated that Mr. Benington had discovered an error of omission by which he had failed to give as a credit to Doublemint its proportion of certain dividends on investments aggregating $17,378.30. Mr. Aldrich agreed that Mr. Benington might go on the stand and explain the said item. Harold Benington resumed the stand for further examination by Mr. Lane.

The cause of the omission of this amount of $17,378.30 was that in calculating the invested capital on which the Wrigley Company is claiming that interest should be allowed as a deduction, I included the investment in two companies as part of the invested capital and properly so, but I forgot to include as income the dividends received from the two companies, and this statement which I now hand you sets out the details.

That will correct Wrigley Exhibit 92, Benington 1, to the extent of increasing the profits of Doublemint in the amount of $17,378.30. I think that will appear on page 23. It will also affect totals and figures on other statements contained in my report to the extent and in the amounts as mentioned on this second sheet which I am going to hand Mr. Aldrich. I discovered this failure to include the item that I have just referred to. I called it to Mr. Lane's attention. I did not receive any suggestion from the counsel for the Wrigley Company with respect thereto. I drew Mr. Lane's attention to it and Mr. Lane agreed that it would be proper to call the master's attention to it and make the necessary correction. The net result of this error is that whenever we examine Wrigley Exhibit 92, Benington 1, and find a final figure there mentioned as my opinion of the total loss for the entire accounting period, that it will be out of the way to the extent that if it is a loss that is shown, that loss should be diminished by $17,378.30. In other words, the practical result of the discovery of this error is exactly the same as though I had discovered that Doublemint had made a profit during the entire accounting period amounting to $17,-378.30, which was not referred to but had been omitted from Wrigley Exhibit 92, Benington 1."

Notwithstanding the fact that this correction was made by Mr. Benington and the attention of both the District Court and the Court of Appeals called thereto, the correction was not allowed in either court. In other words, the sum of $17,378.30 was denied to the injured party and given to the wrong-doer without shadow of justification.

V.

Again, the master allowed interest at the rate of 6% per annum on the award against the Wrigley Company from the end of the accounting period, November 12, 1918. The court had held the Wrigley Company a constructive trustee, or self-appointed agent, selling the Larson gum. Its gross profits on these sales were admittedly $5,152,689.32;

the District Court cut off practically five years of this interest period by only allowing interest from the date of the master's report and the Court of Appeals affirmed this action of the District Court, modifying its finding by reducing the interest to 5% per annum.

It is in this connection that the court makes the following extra judicial statement concerning which the court has no information from the record, and, as we submit, no right to indulge in conjectures as to the effect of such an unscrupulous war by a powerful enemy for a period of over fifteen years, and thus compelling the Larson Company to undergo great expense in money and time. It is also to be noted that while the Court of Appeals reduces the rate of interest on the award to 5 per cent per annum in favor of the Wrigley Company, it allows that company 6 per cent on alleged investment in patents, which was never proved and in fact was not made, as the record clearly shows. We undertake to establish by the record upon the hearing in this court that such investments were not made. Six per cent was allowed by the courts (District and Court of Appeals) contrary to the master's findings, on alleged investment in tangibles. These amounts were $259,120.54 for interest on alleged value of tangibles, and $45,260.79 for interest on investment in patents and patent rights. The master said of these claims for credit on behalf of the Wrigley Company (VII—3229):

> "The items making up the investment in tangible assets would have to be recast before an amount could be arrived at on which in a proper case interest on invested capital might be computed, but as Wrigley's request has not been granted and nothing on account of interest on invested capital has been allowed, it is unnecessary to go into details.
>
> The decree awards to Larson all gains and profits of Wrigley accruing from the manufacture and sale of its Doublemint gum in the infringing dress. Interest on invested capital does not enter into the manu-

facturing or selling cost and is not money paid out or received by the infringer during the period. It has been allowed in patent infringement accounting cases as a deduction from profits, but the question of its allowance in unfair competition cases has not been passed upon. The court directs that the profits be awarded to Larson and does not authorize any deduction to be made therefrom. *Larson* v. *Wrigley,* 253 Fed. 914, 275 Fed. 535."

The master found on the subject of Interest on the Award (VII—3232):

"After the decree had been entered awarding the profits made on Doublemint to Larson, Wrigley wrongfully took the position that no profits were made on Doublemint; that, therefore, Larson was not entitled to any award at all, and has ever since steadfastly sought to maintain that position. It would be inequitable for Wrigley to take Larson's profits and use them while the litigation proceeded without paying interest thereon, and it is recommended that interest at the rate of 6 per cent be allowed on the amount found to be due Larson in this report, $2,860,083.66, from the end of the accounting period, November 12, 1918, to the time of the entry of final decree herein.

It may be said that the amount due was not liquidated at the end of the accounting period, but if that fact prevents the running of interest, no award would draw interest until it had been established by the decision of the last court to which it may be taken, as the master's report when filed does not amount to a liquidation. It is at best but a recommendation. A court of equity in the exercise of sound discretion may allow interest on unliquidated sums or damages in any case where in the facts justice and equity so require. In the exercise of its powers, a court, when necessary to do justice, will apply the equitable doctrine that that is certain which is capable of being made certain, and allow interest on funds from the time when in fairness and justice interest should be computed, though the exact amount of such funds is not ascertained until a later date."

It is respectfully submitted that the following decisions are authorities sustaining the findings of the master upon the subject of interest and afford no warrant for the views of the Circuit Court of Appeals and the District Court:

Tilghman v. *Proctor,* 125 U. S. 136, 160.

Mowry v. *Whitney,* 14 Wall. 620, 653.

B. F. Goodrich Co. v. *Consolidated Rubber Tire Co.,* 251 Fed. 617, 624 (C. C. A. 7th).

Malleable Iron Range Co. v. *Lee,* 263 Fed. 896, 902 (C. C. A. 7th).

Armstrong v. *Belding Bros. & Co.,* 297 Fed. 728, 732 (C. C. A. 2nd). Certiorari denied 265 U. S. 585.

Littlefield v. *Perry,* 21 Wall. 205, 230.

Consolidated Rubber Tire Co. v. *Diamond Rubber Tire Co.,* 226 Fed. 455, 463.

National Folding Box & Paper Co. v. *Dayton Paper Novelty Company,* 97 Fed. 331.

Spalding v. *Mason,* 161 U. S. 375, 395-396.

The general rule that interest only runs from the date of the master's report is in practically all of the decisions limited by the exception that if the conduct of the wrong-doer has been willful, as here three times declared, interest should be imposed from an earlier date; the matter is in the control of the chancellor, subject to these rules. In no other case to be found in the books has the court held the wrong-doer a wanton, aggressive infringer, seeking to forestall his competitor's trade to keep such competitor small, etc., and at the same time refused the injured party interest on the profits awarded him because the malicious wrong-doer had been so successful in his attacks that the profits as found were more than in the opinion of the court the injured party would have made if the wanton attack had not been made.

The rules of public policy afford no warrant for such a decision or speculation, and the writ should issue, as we submit, to correct this reversal of the fundamental rule that it is the duty of the court to so shape its remedies that the wrong-doer shall not profit by his wrong, as announced in *Rubber Company* v. *Goodyear,* 9 Wall. 788, 804.

VI.

The Court of Appeals reversed the master and the District Court and allowed the Wrigley Company credit in this accounting for Doublemint's proportion of income and excess profits taxes paid by the Wrigley Company. The Wrigley Company had claimed $372,942.09 on account of these taxes, and both the master and District Court disallowed such credit.

We print herewith the report on the opinion of the Circuit Court of Appeals, made by Touche, Niven & Co., public accountants, Exhibit C, p. 49, with the petition, giving the amount of this credit as expressed in figures, and which shows that this will effect a further deduction in the amount of the Larson recovery, of $888,256.72, or over $500,000 more than the Wrigley Company claimed it should recover for this item, and at the same time the Larson Company is deprived of all opportunity to take advantage of Sections 327 and 328 of the Revenue Act of 1918.

In all the history of the act under which these levies are made, it has been the practice to exact payment from the person or corporation doing the business; if he, by a judgment of a court, is held to have infringed a patent or trademark, or other liability fastened upon him which establishes that he has in fact paid on profits or property which by adjudication belongs to another, and he pays such judgment or decree, then he is permited to deduct the amount so paid as a loss in his business from his return made in

the following year, and the party receiving such payment is compelled to return the amount in his return made next after such receipt and pay taxes upon the amount so received. There can be no doubt whatever that the Larson Company will be compelled to pay whatever taxes are in force at the time of payment upon any sum received by it from the Wrigley Company, even if the directions contained in the court's opinion sought to be reviewed are carried out.

The principle of only allowing losses in the year in which they are incurred, and making the successful litigant liable for the taxes upon the amount recovered by him only from the date of its receipt, has been a part of each regulation promulgated to carry the law into effect.

It was for this reason that both the master and the District Court disallowed these taxes. The liability to the Larson Company had not been recognized by acquiescence and payment. It was recognized that the Wrigley Company when it paid could recoup its losses, wholly or in part at least, by deducting its loss in its return for the year, the year next after that in which the payment was made; and likewise the Larson Company would return the amount received. If the rate of taxation had remained stable, it is probable that this court would have had no difficulty with the question. The great prosperity of our country has made it possible to lower the rate of taxation as compared with the rates exacted during the years when these profits were earned. Hence the attempt to apply retroactively rules specifically relating only to the present and future, and that, too, in favor of a litigant of the character fixed in this case and against a party which the court says is entitled to all the net profits made. It is submitted that a rule holding that the Wrigley Company, when it commenced its wanton attacks upon the Larson Company, took the risk of such changes in the law, would be much more

consonant with reason and that the rules against a retroactive construction may not be violated for such litigant.

In an opinion of the Solicitor of Internal Revenue (Cumulative Bulletin, July-December, 1922, p. 413), holding:

> "The Commissioner may neither permit nor compel a loss sustained prior to the taxable year 1921 to be accounted for in a previous period.
>
> The Commissioner may neither permit nor compel a loss sustained prior to the taxable year 1921 to be accounted for in such taxable year, or any period subsequent thereto.
>
> The Commissioner may neither permit nor compel a loss sustained in the taxable year 1921, or any period subsequent thereto, to be accounted for in a taxable year prior to 1921."

This is the syllabus. In the opinion we find the following pp. 114-115:

> "No act will be construed as retrospective except to the extent that the statutory language shows the intention 'in unequivocable terms.' This principle was recognized in Solicitor's Opinion 138 (C. B. I.-1, p. 174) in interpreting the provisions of the sections here under consideration. It was held that the limitations imposed with respect to amortization allowances under paragraph (9) of subdivision (a) and paragraph (8) of subdivision (a), respectively, did not limit the right to claim amortization under the Revenue Act of 1918. See also *Twenty Per Cent Cases*, 20 Wall. 179, 187; *Chew Heong* v. *United States*, 112 U. S. 536, 555-559. This important principle was confirmed and strictly applied in the recent case of *Schwab, et al.* v. *Doyle*, decided by the Supreme Court of the United States on May 1, 1922, (C. B. I.-2, p. 312), where the court in interpreting the estate tax provisions of the Revenue Act of 1916, which provide that transfers made 'at any time' in contemplation of death were to be included in the value of the gross estate of a decedent dying after the passage of such Act, said:
>
> 'The initial admonition is that laws are not to be considered as applying to cases which arose before their passage unless that intention be clearly declared. (1 Kent. 455; *Eidman* v. *Martinez*, 184 U. S. 575; *White*

> v. *United States,* 191 U. S. 545; *Gould* v. *Gould,* 245 U. S. 151; Story Const., Sec. 1398.) The comment of Story is: "Retrospective laws are, indeed, generally unjust; and, as has been forcibly said, neither accord with sound legislation nor with the fundamental principles of the social compact."'"

Again, it is a well established rule that the re-enactment of a statute by Congress without change which has received a certain construction, whether judicial or departmental, is an adoption by Congress of such construction; *Trumbull Steel Co.* v. *Routzahn,* 292 Fed. 1009, citing *Sewing Machine Companies Case,* 18 Wall. 553, 584; *Kepner* v. *United States,* 195 U. S. 100; *United States* v. *G. Falk & Bro.,* 204 U. S. 143; *United States* v. *Cerecedo Hermanos y Compania,* 209 U. S. 337.

It is strange that this can be considered a loss to the Wrigley Company which had never charged it off in its books as a loss, or a credit to the Larson Company, which had never on its books noted it as a gain. That the course adopted by the court is inconsistent with departmental rulings, *e. g.,* is well established in a suit determined in 1919 where a taxpayer failed to recover judgment on an account receivable and on a counterclaim against the tax payer a judgment was rendered against it for breach of contract. In that year the amount of the judgment and account were written off, the taxpayers books which were kept on an accrual basis. The case was appealed and the judgment affirmed in 1923. It was held that the filing of the appeal was inconsistent with the charging off of the account, and that the liability on the judgment did not accrue until 1923. Having appealed there was no liability until the case was decided. (*Vide* Cumulative Bulletin IV—2 p. 154).

Office Decision 1141 C. B. 5, p. 134, is a decision upon the subject of when charges are deductible; this decision shows that the profits do not belong to Larson until he gets a decree for them and his opponent obeys the decree by payment; that such a decree is a substitute for legal damages. The opinion concludes with these words:

> "With this understanding of the nature of judgments requiring an accounting of profits in patent infringement cases it is clear that the loss sustained by the infringer must be taken in the year judgment is rendered."

In the present case, as we have seen, this court has repeatedly held that Larson Company is entitled, as the measure of its damages, to the entire net profits, and there was therefore no cause for the court to hazard the guess that whatever deductions are made in favor of the Wrigley Company, the court feels that the amount remaining will be commensurate to compensate Larson Company for its actual losses. Such a feeling on the part of the court necessarily tended to a disregard of precedent and the proper application of the cases as to the character of the Wrigley Company.

In Regulation 45 (1920 edition), relating to income tax and excess profits tax under the revenue act of 1918, we find the following provision (Art. 111):

> "* * * Any amount paid pursuant to a judgment or otherwise on account of damages for personal injuries, patent infringement or otherwise is deductible from gross income when the claim is put in judgment or paid, less any amount of such damages as may have been compensated for by insurance or otherwise. * * *"

In regulations 62 (1922 edition) the provision reads as follows (Article 111):

> "* * * judgments or other binding adjudication such as decisions of referees and boards of review under workmen's compensation laws, on account of damages for patent infringement, personal injuries, or other cause, are deductible from gross income when the claim is so adjudicated or paid, unless taken under other methods of accounting which clearly reflect the correct deduction, less any amount of such damages as may have been compensated for by insurance or otherwise. * * *"

In the Touche, Niven & Co. report filed with our petition herein the similar provision of Regulations 69 is quoted and need not be repeated at this place. It is submitted that we have thus shown a consistent, uniform method of treating this subject in these regulations, which are suggested both by departmental practice and official decision, which excludes any such action as is directed by the court. As we read and understand these regulations the taxpayer, upon the rendition of a judgment against him, may deduct the amount from his return made the following year. It is probable he would be allowed to do that without actual payment; but he could not, as we have seen, do so and at the same time appeal or prosecute a writ of error to reverse the judgment, as such action would be inconsistent with setting up the judgment or decree upon his books as a loss, and claiming credit therefor in his return for the following year.

A change has been made in the 1924 law which provides an exception not appearing in any prior law in that connected with the credits and deductions allowed and which provides that they shall be taken for the taxable year in which "paid or accrued", with this qualification "unless in order to clearly reflect the income the deductions or credits should be taken as of a different period." This has no application here, as we submit, as under the citations heretofore made the law would not be given a retroactive effect.

These matters are discussed in Holmes Federal Taxes, Secs. 757 and 758, and rulings are given in the footnote. Quotation seems unnecessary.

VIII.

It is submitted that this obvious departure from previous practice and decisions by which without acquiescence by the Wrigley Company in its defeat and without the receipt of any payment by the Larson Company, the court imagines both acquiescence and payment, should call for the issuance of the writ here sought, to the end that the law may be uniform and certain.

It is our contention that the following words "making proportionate deductions for overhead, advertising and other proper expenses" should be stricken from the decree by order of this court, and that the court below, upon the authority of the cases last cited and other cases referred to in a later subdivision of this brief, should be directed to enter a decree for the admitted gross profits of the Wrigley Company arising from its manufacture and sale of Doublemint gum in its infringing dress during the accounting period of $5,152,689.32. To that end we file with our petition for certiorari a motion for such direction by this court.

The cases above cited holding that the trespasser upon timber or coal lands, knowing that he is unlawfully taking property he is not entitled to, shall not be allowed for any cost of cutting, transportation or other work put upon the property; (*Woodenware Co.* v. *United States,* 106 U. S. 432, 35) that the fraudulent grantee cannot recoup the consideration paid for the grant, nor for the improvements made upon the property; (*Railroad Co.* v. *Soutter,* 13 Wall. 517, 523, 534) that an attorney and agent who invests his own money in purchasing the property of his client or principal, when called upon by his principal to account, cannot be allowed credit for moneys he has paid in making

such unlawful purchase, (*Commonwealth Finance Corp.* v. *McHarg,* 282 Fed. 560, 589 (C. C. A. 2nd)) all justify the rule for which we contend.

Courts of equity are enforcing the broadest principles of public policy, which is the foundation of its jurisdiction and the reason for its growth. This was broadly stated in an infringement case (*Rubber Company* v. *Goodyear,* 9 Wall. 788, 804):

> "'Profit' is the gain made upon any business or investment, when both the receipts and payments are taken into the account. The rule is founded in reason and justice. It compensates one party and punishes the other. It makes the wrong-doer liable for actual, not possible, gains. The controlling consideration is, that he shall not profit by his wrong. A more favorable rule would offer a premium to dishonesty, and invite to aggression.
>
> The jurisdiction of equity is adequate to give the proper remedy, whatever phase the case may assume, and the severity of the decree may be increased or mitigated according to the complexion of the conduct of the offender."

Hence it was, having in mind this power inherent in every court of equity, that this court gave its adherence to the suggestions made in the decision of the *Hanover Milling Co.* v. *Metcalf,* 240 U. S. 403, 415, as to the adoption of a mark "with some design inimical to the interests of the first user, such as to take the benefit of the reputation of his goods, *to forestall the extension of his trade, or the like.*" And again, in *United Drug Co.* v. *Rectanus Co.,* 248 U. S. 90, 101, this language was repeated. It is submitted that the necessary implication from this language is that if in an unfair trade case the infringer has maliciously selected the mark with the purpose and intention of forestalling the first user, to clip the wings of Larson for the purpose of eliminating Larson as an actual or potention competitor, he is liable for all profits without reference to the usual question of loss of trade. And when there

is added to this adjudicated character of the Wrigley Company established by the three opinions of the Court of Appeals in this record, the established fact that in both suits against the Larson Company it prostituted the courts of the United States and their processes by filing false bills, supported by false oaths, knowingly made, and added to this crime others, such as tampering with the records of the court, making false statements to the court (II—523) (II—524) seeking to corruptly influence the court's accountant, introducing false testimony and threatening to ruin Mr. Larson if he continued the prosecution of his counterclaim (VII—3073) the principles of the *Woodenware* and *Pine River Logging Co.* cases, *Railroad Co.* v. *Soutter, Commonwealth Finance Corporation* v. *McHarg,* and other cases, are clearly applicable.

This court recognized that such conduct on the part of a litigant required the application of different rules of recovery when in *Westinghouse Co.* v. *Wagner Mfg. Co.,* 225 U. S. 604, 620, it said:

> "The rule, however, is not to penalize the infringer, nor to give the patentee profits to which he is clearly not entitled. So that where, by general evidence, expert testimony or otherwise, it is shown that his patent is of relatively small value, it will often be possible to prove that, at the utmost, it could not have contributed to more than a given amount of the profits. *Lupton* v. *White,* 15 Vesey Jr., 432-440. In such cases, except possibly against one who had concealed or destroyed evidence or been guilty of gross wrong, the plaintiff's recovery cannot exceed the amount thus proved, even though it be impossible otherwise more precisely to apportion the profits."

And in making this exception and that as to forestalling referred to above in the two cases cited, the court was not departing from well established principles and analogies of the law. It has long been the rule, even in common law courts, that malice was to be inferred from want of probable cause, and that an action for malicious prosecution

can be maintained for bringing an action without probable cause, even though there was no seizure of person or property. There has been conflict of authority on this, growing out of the misapprehension of the Statute of Marlbridge (52 Henry III), but we think the weight of authority supports the statement as we have made it.

It is thought that there is every reason for applying the strict rule of these cases to the Wrigley Company in this case under the findings made by the Court of Appeals as to its character and purposes throughout this litigation.

Upon the issuance of the writ we respectfully ask the court to amend the decree of October 14, 1918, by striking therefrom the direction to make proportionate reductions for overhead, advertising and other proper expenses, thus holding the Wrigley Company for the gross profits, with interest from the end of the accounting period, November 12, 1918. We undertake to show that no other litigant in a civil suit ever made so base a record as that made by the Wrigley Company. Both of its original bills against the Larson Company were knowingly, and now are confessedly, false, and in the conduct of this long drawn out litigation they have committed offenses against the administration of justice which call for the application of the severest rules applicable to the conduct of dishonest parties in a court of equity.

We submit that the rules applied in this court in *Woodenware Co.* v. *United States,* 106 U. S. 432, 35; *Pine River Logging Co.* v. *United States,* 186 U. S. 279, 293, 294; *Railroad Co.* v. *Soutter,* 13 Wall. 517, 523, 534; *Guffey* v. *Smith,* 237 U. S. 101, 119; *Grant* v. *Fletcher,* 283 Fed. 243; *Big Seske Oil Co.* v. *Cochran,* 276 Fed. 216 (C. C. A. 9th); *Lynch* v. *Burt,* 132 Fed. 417, 432 (C. C. A. 8th); *Sherman Saving Loan Soc.* v. *Tull,* 136 Fed. 1 (C. C. A. 9th); *Commonwealth Finance Corporation* v. *McHarg,* 282 Fed. 560, 589 (C. C. A. 2nd) and the recent decisions of this court in the *Pan*

American and *Teapot Dome* cases, are the only ones adequate to meet the situation prescribed by this record.

And this conclusion is likewise in accordance with those rules of public policy upon which from the earliest times the chancery courts both in this country and in England have applied their remedies as against parties who came into these courts as wanton and willful wrongdoers, upon pleadings which, as in the case at bar, were characterized as "a bill supported by a false oath, knowingly made" with the purpose "to forestall its opponent", "deceive the court", "to clip the wings of its rival", and in the prosecution of such purposes has clearly and indisputably tampered with and mutilated the records of the court with the purpose of putting forward a bogus package as the subject matter of the prior litigation, and when exposed in this plot made a knowingly false statement to the court presented false evidence before the master and attempted other corrupt practices. The record shows, and it was never denied, that they threatened Mr. Larson, President of the Larson Company, with financial ruin and loss of reputation if he continued this litigation.

It is our contention that no decision has been rendered in recent years that is so in conflict with the settled policy of the law as evidenced by court decisions; that to give to such a litigant, whose bad character has been so repeatedly declared by the courts in this litigation, practically all of the profits made by its wrong-doing, is to poison the sources of the law, to put a premium upon wanton aggression, forestalling, the use of bills in equity sustained by false oaths, knowingly made, as a means of attacking a competitor in trade.

We insist that these evil practices have prevailed in this case in the decision of the District Court and the affirmance of its action by the Circuit Court of Appeals and the added deductions made by the latter court and so violate the express letter of your decisions in the regards herein stated as well as the rules of public policy often announced by this court as to clearly entitle the petitioner to the relief herein asked.

Respectfully submitted,

CHARLES H. ALDRICH,

Solicitor and of Counsel.

GEORGE I. HAIGHT,
RALPH L. PECK,
CHESTER D. KERN,

Of Counsel.

APR 9 '28
CHARLES ELMORE

No. 603

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1927.

L. P. LARSON JR. COMPANY,
Petitioner,

vs.

WM. WRIGLEY JR. COMPANY,
Respondent.

Brief and Argument for L. P. Larson, Jr., Co., Petitioner.

CHARLES H. ALDRICH,
Solicitor for Petitioner, L. P. Larson, Jr., Co.

GEORGE I. HAIGHT,
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BARNARD & MILLER PRINT, CHICAGO

SUBJECT-INDEX.

Statement of Facts.

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The first suit by the Wrigley Company against the Larson Company was brought in the then Circuit Court of United States, Seventh Circuit, A. D. 1911. 1

In the bill filed it gave a wholly false history of the Spearmint package, as has since been established in this record and admitted by Wm. Wrigley, Jr., President and chief shareholder in complainant company in his answer to interrogatories filed in the consolidated case 1

This record has established, as was stated in the course of the hearing of one of the appeals herein, that the bill then filed was sustained by a false oath, knowingly made 1

The package sued on by the Wrigley Company was stolen from Frank F. Pulver and the Di-Gesto Company, of Rochester, N. Y..... 1

The Wrigley Company had brought suit against the Rochester interests, both in the Southern and Western Districts of New York, and after much evidence had been taken, bought out the Pulver interests for two hundred and fifty thousand dollars, of which one hundred thousand was cash and the balance in five notes of thirty thousand dollars each, in annual payments 1

After this arrangement was made, and the Wrigley Company owned both sides of the litigation, a consent decree was entered finding Pulver had infringed the package which belonged to the Wrigley Company, had paid the damages, etc..... 2

The Pulver factory was demolished and its business discontinued 2

The second suit by the Wrigley Company against the Larson Company was begun in the District Court of the United States, Northern District of Illinois,

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Eastern Division, on June 15, 1915, and was based upon a bill giving the same false history of the Spearmint package as was contained in the earlier bill of 1911, and which also averred that the Wrigley Company had in July, 1914, originated and put on sale a brand of gum known as Doublemint; that it had dressed the individual sticks of the five-stick packages in green paper in order that they might be readily distinguishable from the Spearmint packages of five sticks which were wrapped in pink paper, also manufactured and sold by it; in the counterband enclosing the five sticks the same colors were used, except that they were reversed..... 2

The complaint was made that the Larson Company, with the wicked purpose of taking advantage of the Wrigley Company's reputation and the large amount expended by it in advertising, had, subsequent to the initial sales of this Doublemint product, begun the manufacture and sale of a product known as Wintermint, which it had dressed so that the buying public made no distinguishment between the Wintermint product of the Larson Company and the Spearmint and Doublemint product of the complainant, and because of which it had already suffered damages, exclusive of interest and costs, of fifty thousand dollars, and was threatened with other greater damages 2

These two causes, so brought by the Wrigley Company, were consolidated by order of court..... 3

The Larson Company, by amended answer filed by permission of court, set out the history of the Pulver litigation, the purchase of the Pulver business; its discontinuance; the entry of a consent decree in such litigation falsifying the facts which were that, Pulver was the originator of the dress described in the Wrigley bills, had used it extensively for more than twelve years before it was stolen by the Wrigley Company 2-3

As to the second suit brought by the Wrigley Company, the Larson Company showed by answer and counterclaim that it originated the Wintermint package in December, 1913, filed its name and dress February

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3, 1914, that it received its notice of allowance and publication from the office of the Librarian of Congress, May 5, 1914, and final certificate July 21, 1914; that it had been advised that the Wrigley Company intended to infringe its package, and in May 1914, wrote to the Wrigley Company to that effect, and in answer to an inquiry from the Wrigley Company as to the packages referred to, on June 3, 1914, sent to the complainant both packages. The Larson Company again set out the facts about the stolen Spearmint package and trade dress, and the facts about its own priority, and notice to the Wrigley Company, and that its suits were not brought in good faith but to injure it and circumscribe its trade. 2

The Larson Company took evidence both by deposition and in open court to sustain these averments..... 3

Confusion was admitted in the answer and counterclaim 3

The consolidated cases were tried together upon the bills, answers and evidence, and resulted in the dismissal of both the bills of the Wrigley Company for want of equity, and also the dismissal of the counterclaim on the ground that there was no proof of confusion 3

The Larson Company claimed no proof of confusion was required upon the averments of the bill, and the admission of the answer and counterclaim..... 3

Appeals were prosecuted by both parties to the Circuit Court of Appeals, Seventh Circuit, which affirmed the District Court in the dismissal of the Wrigley Company bills, and reversed its dismissal of the counterclaim of the Larson Company..... 3

This decision is reported in 253 Fed. 914..... 3

The Wrigley Company, in January, 1916, after both the causes above referred to were at issue and ripe for hearing, caused to be organized in Canada and Australia, new corporations to which it transferred the factories situated in these respective countries, taking corporate stock in the respective corporations therefor 3

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The Australian Company and its affairs are not involved in this case, as the expense and delay of auditing its business was thought to make such pursuit inadvisable.

The Canadian Company was transferred for $500,000 par value, preferred shares of the Canadian Company, and $2,000,000 par value, common shares; this stock at the time of the hearing before the master upon the questions involved by reason of such action, was held, as to the preferred, by the Wrigley Company; the common shares had been distributed as a share dividend to the shareholders of the Wrigley Company. Of the 20,000 shares so distributed, two Canadian citizens had acquired approximately 1,500 shares. The table of shareholders and directors showed that the Wrigley defendant interests controlled the Canadian Company.

The Canadian Company continued the infringement until October 19, 1921..... 3

In behalf of the Larson Company a motion was made before the master to whom the cause had been referred under the decree directed by the decision above referred to, to require the accounting defendant to file an account of the profits made by the Canadian Company 4

In behalf of the Wrigley Company it was contended that the Larson Company had sold no Wintermint gum in Canada, and was not entitled to have an accounting for sales by the Wrigley Company there made; and also that the Larson Company was not entitled to an accounting in the United States for sales except where it had established its trade, and the Wrigley Company moved to take evidence from the Larson Company officers and its books to show where it had sold its Wintermint gum. It was conceded by the counsel for the Larson Company that it had made no sales of Wintermint gum in Canada, but it was insisted that under the decree as entered, and the facts of the case, the master had no jurisdiction to enter upon such an inquiry..... 4

The master, while not deciding the question thus raised, held that it was his duty to take evidence on this subject, which was done..... 4

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Upon being advised by Mr. Larson that he had been threatened by two executive officers of the Wrigley Company and its attorneys that he would be engaged in litigation for ten years, and would be ruined financially and in reputation, if he persisted in prosecuting his counterclaim, it was determined to bring these questions to decision without further delay, and Mr. Larson was advised to refuse to answer any more questions about his business, or furnish further evidence from his books..... 4

This was done and certified by the master to Judge Carpenter who ordered the questions to be answered. 4

An appeal was taken from Judge Carpenter's decision to the Circuit Court of Appeals, and also an order procured from that court directing Judge Carpenter to show cause why he should not obey the mandate ordered by that court under its decision reported in 253 Fed. 914..... 5

The Court of Appeals reversed Judge Carpenter, and warned him against any further excursions (275 Fed. 535) 5

The counsel for the Wrigley Company sought a rehearing in a brief of 113 pages, in which they admitted the court had decided against them every question for which they had contended, and notwithstanding the fact that such petition was overruled, again contended before the master for the very things they admitted had been decided against their contentions. 5

Some of these admissions appear as Exhibit D, pages 59-62 in the Larson petition for certiorari herein.. 5

In this opinion the court made very clear the fact that the Wrigley Company had commenced its suits, not in good faith but to forestall the Larson Company, and in the prosecution of that purpose had deceived the courts and been guilty of dishonorable conduct.

The master found the gross profits of the Wrigley Company from the manufacture and sale of Doublemint gum in its infringing dress to be $5,152,689.32. There is no contention about these figures. The master reported the net profits as $2,860,083.66..... 5

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The District Court, upon exception by the Wrigley Company, reduced the master's findings to $1,384,-649.48, and disallowed the right to an accounting for the acts of the Canadian Company, which the master had separated from the accounting in the United States in the interest of expediting this accounting, and which both the master and the counsel for the Larson Company understood had been acceded to by the counsel of the Wrigley Company when they applied for the fifth extension of the time within which an accounting for the Canadian Company should be filed.

As this was repudiated by counsel of the Wrigley Company, and is not within the limitation placed by this court upon the present argument, the right of the master to make such separation, and the right of counsel to accept the extension sought, and then repudiate its conditions, need not be discussed here.

The Wrigley Company filed voluminous exceptions to the master's report..... 5

The Larson Company did not file exceptions, but gave notice it would seek to strike from the decree the words "making proportionate deductions for overhead, advertising and other proper expenses" when it reached the Court of Appeals, thus overlooking the fact that such court would have no jurisdiction to amend its mandate and decree after the term at which it decided the cause..... 5

It was expected to found this motion upon the malicious and dishonest conduct of the Wrigley Company commented upon and found in the various opinions of the Circuit Court of Appeals in this litigation, and upon certain opinions of this court.

Both parties appealed from the decision of the District Court to the Circuit Court of Appeals, Seventh Circuit, which sustained the District Court in the deductions made, and also allowed the Wrigley Company credit for income and excess profits taxes paid on the Doublemint business..... 6

These taxes had been disallowed by both the master and the District Court..... 6

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The method of computing these taxes would credit the Wrigley Company with a much larger sum than was claimed by it in the accounting before the master.

The last decision of the Court of Appeals is reported 20 F. (2d) 880 6

Both parties petitioned this court for the writ of certiorari 6

The petition of the Larson Company was granted, this court ordering that the argument be limited to the question of the income and excess profits taxes.... 6

The petition of the Wrigley Company was denied..... 6

Pursuant to the mandate of this court, we in this brief discuss only the question reserved by this court.

ASSIGNMENT OF ERRORS 6-7

ARGUMENT 8

The reasons of public policy, not to say necessity which have led the courts to hold that in the administration of revenue laws, all questions arising thereunder shall be first decided by the agencies created by the law itself; that such laws constitute "a system of corrective justice," as this court has said, which is exclusive in character and therefore no other remedy can be substituted therefor..... 8-9

The income tax law and the regulations provided thereunder, in accordance with its provisions in force during the period of infringement, provided that the person infringing could upon the decree of the court establishing infringement, and acquiescence therein on his part, have credit on his following year's taxes for the amount of such decree so paid..... 9

While the injured party, who had recovered a decree for infringement, and received payment of the amount thereof, should set out in his following year's statement the amount so received and pay taxes thereon 9

In the present case the Larson Company is deprived of the rights conferred by Sections 327 and 328 of

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the Revenue Law printed at pages 56 and 57 of the Larson petition herein 9-10

It is argued that these provisions are exclusive, and that the tax law makes no provision for any other way, and it follows that a reference for an accounting did not authorize the court to extend its authority to this subject, governed by law which has the effect of excluding court action 10

Congress by adopting the original provisions of the law with reference as to how reimbursement should be had by the infringer and how the amount received by the injured party should be taxed excluded all other ways 11

The Wrigley report for 1927 is printed herewith as a part of our argument showing the want of any reality to the fears of the Court of Appeals lest the Wrigley Company should not receive full reimbursement 12

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IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1927.

No. 603

L. P. LARSON JR. COMPANY,
Petitioner,

vs.

WM. WRIGLEY JR. COMPANY,
Respondent.

Brief and Argument for L. P. Larson, Jr., Co., Petitioner.

STATEMENT OF FACTS.

The Wrigley Company first brought suit against the Larson Company in October, 1911, upon the claim that the Larson Company's "Peptomint" package of gum infringed in its color scheme and trade dress the complainant's Spearmint package. It gave a wholly false history of the origin of this trade dress and its date of use; it was established by proof in the later litigation that the Wrigley Company had stolen such color scheme and trade dress from one Frank F. Pulver and the Di-Gesto Company of Rochester, New York, and in 1912 had bought out the Pulver concern for two hundred and fifty thousand dollars, payable partly in cash and partly in notes, and after it owned both sides of the litigation then pending between the Wrigley Com-

pany and the Pulver interests had entered a consent decree finding Wrigley the owner of the common package, that Pulver had infringed and paid the damages therefor. Upon the entry of such decree the Pulver business was wrecked and discontinued.

The second suit brought by the Wrigley Company against the Larson Company was begun in June, 1915, and alleged that the Larson Wintermint gum was an infringement of the Wrigley Company's Spearmint and Doublemint gum, which last gum, it was averred in the bill, was first manufactured and sold in July, 1914. It was claimed that the Wrigley Company had dressed the individual sticks of Doublemint gum in green paper so that the two different packages of Spearmint and Doublemint might be readily distinguishable from each other, and thus, it was averred, they were easily distinguished from the pink individual wrappers of the Spearmint product. It was averred that the buying public made no distinguishment between the Wintermint product of the defendant and the Spearmint and Doublemint product of the defendant, and that the defendant had brought out the Wintermint product subsequently to the Doublemint product to take advantage of the reputation of such product, and that it had already suffered damages, exclusive of interest and costs, of fifty thousand dollars, and was threatened with other greater damages, etc.

The Larson Company had adopted its Wintermint dress in December, 1913, filed its papers claiming the name "Wintermint" in such trade dress February 3, 1914, notice of allowance and publication was May 5, 1914, and final certificate was issued July 21, 1914. (I—382-386.) It had notified the Wrigley Company of its information that it intended to infringe, in May, 1914, and sent it copies of both its Peptomint and Wintermint packages on June 3, 1914. (I—468, 469.) In its answer and counterclaim to

the Wrigley bill of 1915, it exposed the entire facts of the stolen Spearmint package ,the Pulver litigation, the consent decree, and agreed to the confusion between the Doublemint and Wintermint packages, the facts of notice to the Wrigley Company of its prior rights, and that this second suit was brought with the wicked intention of injuring it with full knowledge of its (Larson Company's) priority, etc.

The two cases of October, 1911, and June, 1915, were by order of court consolidated, and tried together, and resulted in the dismissal of both the Wrigley bills for want of equity, and also the Larson counterclaim in the June, 1915, suit, for the reason that there had been no proof of confusion. The Larson Company claimed that no proof of confusion was needed in view of its averment in the Wrigley bill and the admission thereof in the Larson counterclaim.

From this action of the District Court appeals were prosecuted by both parties to the Circuit Court of Appeals, Seventh Circuit, which sustained the District Court in its action dismissing both the Wrigley bills for want of equity, and reversed its action on the Larson counterclaim. This decision is reported in *Larson Company* v. *Wrigley Company,* 253 Fed. 914 (C. C. A. 7th). The decree under the mandate of this decision was entered in the District Court on October 14, 1918, (I—515, *et seq.*), and although such decree directed an accounting of all profits made by the Wrigley Company in the manufacture and sale of Doublemint gum in the infringing dress from its first sale on July 28, 1914, to such time as such dress should be changed (which was, as to the United States, November 12, 1918, and as to the Canadian Company (organized by the Wrigley Company in January, A. D. 1916, after the cause was at issue, and controlled by the Wrigley Company, defendant) October 19, 1921), it appeared soon after the opening of hearings before the master to whom the cause was re-

ferred for the purpose of the accounting, that the Wrigley Company claimed that the decree did not require any accounting by it in Canada or other foreign countries, or in the United States where the Larson trade in Wintermint had not been thoroughly established. It was conceded that the Larson Company had not sold its Wintermint gum in Canada; in behalf of the Larson Company it was claimed that the evidence clearly established a case of forestalling on the part of the Wrigley Company, and as such it was liable for all profits made on its Doublemint gum in the infringing dress, wherever made, and a motion was made in its behalf requiring the Wrigley Company, defendant, to file an account in behalf of the Canadian Wrigley Company of its profits on its long period of infringement, while in behalf of the Wrigley Company its counsel moved for an examination of the officers and books of the Larson Company to determine the extent of its Wintermint business. The master thought it his duty to hear this evidence, and over the objection and exception of counsel for the Larson Company as to his jurisdiction so to do, and as to the competency of such evidence, but not as to the time of doing it, proceeded for about a year to investigate the Larson business, until it became clear and in fact was avowed by some of the executive officers of the Wrigley Company and by its attorneys that their intention was to ruin him by extended litigation, both financially and in character, if he persisted in this litigation. (VII—3073|)

Whereupon, counsel for the Larson Company instructed Mr. Larson to decline to answer any more questions or furnish more information from his books about his business, which he did, and the master certified the issue so made to the District Court (Carpenter, J.), who held that the questions should be answered; whereupon the Larson Company perfected an appeal to the Circuit Court of Appeals, Seventh Circuit, and also petitioned for and ob-

tained an order of the Circuit Court of Appeals directing Judge Carpenter to show cause why he should not obey the mandate of the Circuit Court of Appeals issued to carry into effect its former opinion in the cause. The opinion of the court upon the issues thus raised is reported in *Larson Company* v. *Wrigley Company*, 275 Fed. 535 (C. C. A. 7th). The counsel for the Wrigley Company filed a petition for a rehearing, 113 pages in length, in which they admitted the court had decided against them every question for which they have since contended, which petition was overruled. (Certiorari denied 248 U. S. 580.) Some of these admissions as contained in the petition for a rehearing are reprinted, pp. 59-62 in our petition for certiorari herein.

The master found the gross profits of the Wrigley Company on the sale of Doublemint in the infringing dress, $5,152,689.32 (VII—3207); and the net profits $2,860,-083.66 (VII—3230). The District Court reduced this finding to $1,384,649.48 (5 F. (2d) 731-749.) The Wrigley Company filed voluminous exceptions to the master's report, while the Larson Company contented itself with notice that in the court it would move to amend the decree by striking therefrom the words "making proportionate deductions for overhead, advertising and other expenses." It was later concluded that the Court of Appeals had no jurisdiction to thus change its mandate after the term of its decision, and that only this court had such jurisdiction.

Both parties appealed from the decision of the District Court to the Circuit Court of Appeals, Seventh Circuit, which sustained the District Court in the deductions made, and many of which were in clear disregard of the terms of the decree entered, and therefore as is contended beyond the court's jurisdiction, and also allowed the Wrigley Company a credit for income and excess profits taxes paid on the proportion of the business, which had been, by the prior decisions and was again, adjudicated the business of the

Larson Company, conducted by the Wrigley Company as its agent, or trustee, with the purpose of forestalling and clipping the wings of the Larson Company. This decision is reported 20 F. (2d) 830 (C. C. A. 7th).

From this decision both parties sought from this court the writ of certiorari.

The petition of the Larson Company was granted, the court ordering that the questions to be re-examined be limited to those relating to deduction of federal income and excess taxes from net profits awarded petitioner.

The petition of the Wrigley Company was denied.

ASSIGNMENT OF ERRORS.

The Circuit Court of Appeals, Seventh Circuit, erred in allowing the Wrigley Company any credit as against the Larson Company for income and excess profits taxes paid by it for account of the Doublemint business during the infringing period, and during which period the Wrigley Company has been held because of its wicked and malicious purpose to forestall the Larson Company and prevent the growth of its business, to have been the agent and trustee of the Larson Company, and wherever it sold Doublemint gum to have done so as such agent or trustee *ex maleficio*, because

a. The provisions of the income and excess profits law as enacted by Congress and the rules and regulations for its administration, adopted under its previsions, do not contemplate or provide for the recovery of any such taxes paid by an infringer from the injured party, but only from the United States by credit or refund.

b. The provisions of such income and excess profits law as enacted by Congress and the rules and regulations for its administration, adopted under its provisions, do not contemplate or provide that the injured party whose rights have been invaded by a wanton and malicious infringer who has sought to forestall such injured party, and to keep his business from growing, "to clip his wings" (using the language of the Court of Appeals here sought to be reviewed), and in the pursuit of such purpose has been guilty of such conduct in the courts of equity as make his presence there a profanation, should be required to pay such forestaller in advance of any acquiescence in the decree establishing these facts, and in advance of any payment by such forestaller, by credit or cash, as a condition of recovery of the amount of such taxes paid on the infringing business. On the contrary, such law provides that when the injured party receives payment he shall return the amount thereof in his tax schedule to be returned after such receipt, and pay taxes on the amount so received.

c. The income and excess profits tax law, and the rules and regulations enacted thereunder for its administration, constitute a system of corrective justice complete in itself, and contain no provisions to correct a court which imagines and compels acquiescence in the decree of infringement, where there has in fact been none, and at the same time assumes and compels a vicarious acceptance of a sum of money which has not in fact been paid or tendered, and *which is less than the interest on the profit money in the wrong-doer's hands,* as a condition of decision, and makes and can make no order which will prevent the forestaller from recovering from the United States, if he finally does make payment, or restraining the United States from collecting again from the injured party if and when the decree is paid.*

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*In making these assignments of error we do not waive the other errors committed in the changes made in the master's report by the District Court and the Circuit Court of Appeals (C. C. A., 7th) nor the motion to amend the decree referred to in the petition. We are contemporaneously with the filing of this brief moving the court for permission to file printed suggestions on these matters.

ARGUMENT.

I.

The income tax laws established by Congress and the regulations made in pursuance thereof, constitute a system of corrective justice. The courts will not interfere with this procedure until the remedy has been exhausted.

You have restricted the argument to the question of whether the Court of Appeals should have allowed the Wrigley Company credit for the income and excess profits taxes paid by it upon that portion of the business adjudicated to have been done by it as the self-appointed agent or trustee for the Larson Company.

The Master and District Court did not allow it such credit. (Exhibit "A".)

The Court of Appeals made such allowance.

Preliminary to the discussion of this question we submit that in the administration of tax and revenue laws it has been the policy of the courts to leave such administration to the officers and agents entrusted therewith by the statutes under which the taxes are levied or the collections are authorized. The courts have usually declined to act or interfere in any way until the person claiming to have suffered injury has exhausted his remedies under the statute.

The reasons of public policy for this rule, which precludes action in or by the courts until the procedure prescribed by the statute has been followed to the end, and payment made by the party injured, are stated in part in *Cheatham* v. *United States*, 92 U. S. 85, 88-89, and the cases there cited. Vide also *State Railroad Tax Cases*, 92 U. S.

575; *Dodge* v. *Osborn*, 240 U. S. 118; *Graham* v. *Du Pont*, 262 U. S. 234. After payment and making refund claim the aggrieved party is given the right to sue the government for the return of the amount paid, and if a loss is incurred the taxpayer is allowed credit therefor by a deduction, in computing his taxable income.

We submit, however, that these principles of public policy, this "system of corrective justice," as this court has denominated it, does not exist only for the benefit of the government, but that the tax laws applicable here, and in nearly all other cases, vest discretionary powers in executive or administrative officers designed to protect the taxpayer, as well as the government, and of a nature incapable of exercise by a court in an accounting case; *e. g.*, in the case at bar the Larson Company had a small capital of one hundred thousand dollars; the Wrigley Company had a large capital and surplus, and has been adjudicated an infringer who sought to forestall and limit the trade of the Larson Company. None of the profits made by it in this unlawful enterprise were in fact paid to or received by the Larson Company. The Court of Appeals has made an imaginary or vicarious payment, and in doing so it necessarily deprives the Larson Company of its right to apply to the Commissioner under Sections 327 and 328 of the Revenue Act of 1918, printed at pages 56 and 57 of the Larson petition herein. Owing to the abnormal conditions as stated affecting the relations between the capital of the Larson Company and this income, if it had been received, there would have been without doubt an application to the Commissioner for action under these sections, and there can be no doubt that relief would have been granted. This is prevented, if the action of the Court of Appeals is approved, as the power is one given by the statute only to the Commissioner and cannot be collaterally exercised.

The Commissioner in the exercise of the power here conferred is required in such cases to determine the tax with reference to "representative corporations engaged in a like or similar trade," by whose experience he acts in determining the correct amount of the tax, and we respectfully submit that no substitute for this method prescribed by law can be lawfully forced upon the Larson Company. The contention that the courts could not exercise these functions is, as we think, supported by the reasoning in *State Railroad Tax Cases*, 92 U. S. 575, 614-615, *supra*.

As stated in the report of Messrs. Touche, Niven & Co., made a part of the petition for certiorari herein and of our argument (p. 51), the court very plainly misunderstood the effect of its declarations on this subject.

II.

The remedy of the Wrigley Company for the recovery of taxes paid by it is provided by statute and this remedy is exclusive.

There is another principle applicable to these questions of taxation which precludes any credit to the Wrigley Company at this time and under the facts established in this record; and that is, that a remedy for the recovery of taxes paid by the infringer which he may be entitled to recover is provided by statute, and in such case the statutory remedy is exclusive and no other remedy can be substituted for it. *Dodge* v. *Osborn*, 240 U. S. 118, 120. Same effect, *Emaus Silk Co.* v. *McCaughn*, 6 F. (2d) 660, (E. D. Pa.)

Under the statute, regulations in force, and decisions, the Wrigley Company is entitled to claim of refund or credit from the United States based upon the amount of the Larson Company decree for infringement of its rights, and it has acquiesced in such decree by failure to appeal or object

to the decree in some way so that it has become final and conclusive upon it.

Sec. 284, Act of 1926.

Regulation 69, Art. 112, 1304, 1305, 1306.

The same provisions in substance have been in force during all the accounting period.

Congress by adopting without material change, the corresponding provisions of earlier acts, is deemed to have adopted the regulations of the departments in interpreting and applying them.

National Lead Co. v. *U. S.*, 252 U. S. 140.

U. S. v. *Anderson*, 269 U. S. 439.

And it is held that regulations of the department have the force of law. *Walsh* v. *Capewell*, 4 F. (2d) 991; *Simon* v. *Frankfort Distillery*, 2 F. (2d) 949.

The Income Tax Law nowhere contemplates that in cases of infringement the person who is adjudged guilty of such infringement shall recover, as a credit against the party injured, the amount which has been paid as income and excess profits taxes upon the infringing business. On the contrary, it is clearly provided that such infringer may recoup such loss through making proper claim to the Treasury Department therefor; clearly it was not intended that the infringer should have the advantage both of the credit as a necessary expense of the business as decreed by the court, and a second credit for the full amount of the decree as a loss in computing his tax liability; such a procedure would offer a premium to the Wrigley Company and other companies desirous of throttling competition; and likewise the injured party would be doubly taxed by the credit allowed by the Court of Appeals in this case, and again when it received the amount of the decree. The tax law has no provision to adjust such a condition of affairs as would be brought about by the affirmance of this opinion. It would

seem as though the court might well have assumed that the remedies provided by the statute and regulations for the recovery of the money by the Wrigley Company would have been as adequate to meet the demands of justice as its own feeble statement, "There may be no profits adequate therefor, in which event the tax thus paid would be lost to Wrigley. But in any event, we do not think it would be equitable as between these parties to require Wrigley to pay back the full net profits without any reduction for this tax, on the faith that somehow and somewhere and sometime, it will be refunded."

We print herewith and adopt as a part of our argument, a true copy of the Wrigley Company's published statement for the year 1927, anent the fears expressed by the learned court as to the danger of there being no profits, marked "Exhibit B". (Page 26.) The obligation of the United States, to allow the deduction should, it would seem, have been sufficient. Such solicitude for the malicious wrongdoer has not before been displayed in any equity court so far as we can discover.

III.

The action of the Court of Appeals deprives the Larson Company of its opportunity to use the special remedies provided by Congress in its system of corrective justice. The action of the Court of Appeals is opposed to the statute, the rules and regulations thereunder, and to the holdings of this court.

The Wrigley Company has been adjudicated a wrongdoer in terms almost without parallel in judicial decision and no equity arises in its favor.

Pan American v. *United States,* 273 U. S. 456, 509.

As is well known, an equal amount of earnings by two or more corporations does not necessarily mean an equal amount due from each corporation to the United States for

account of income and excess profits taxes. It may depend upon capital invested and its relation to such earnings, salaries paid, losses incurred, and many other incidents of business. The court very frankly admits this when it says that "it will not be equitable to require Larson to pay at a higher rate than that which it would have paid if the net profits had been paid by Wrigley to Larson as they accrued and before Wrigley had paid any tax thereon. In undertaking to avoid inequity towards Wrigley, inequity should not be done Larson through requiring Larson to bear a higher tax than would have been collectible had the profits been paid over as earned." Had the court really considered this phase of the matter, we are persuaded the decision as to these taxes would never have been pronounced.

In all the regulations applicable to these taxes, that is, in force at the date of their levy and payment by the Wrigley Company, the following provision has been in force: "Judgments or other binding adjudications, such as decisions of references and boards of review under workmen's compensation laws, on account of damages for patent infringement, personal injuries, or other cases, are deductible from gross income when the claim is so adjudicated or paid, unless taken under other methods of accounting which clearly reflect the correct deduction, less any amount of such damages as may have been compensated for by insurance or otherwise."

Sec. 12 Act 1916.

Sec. 213—(b)—214 (a)—Act 1918.

Sec. 234 Act 1918.

Regulations 69, Articles 50 and 112.

Regulations 65, Articles 50 and 112.

Regulations 62, Articles 51 and 111.

Regulations 45, Articles 52 and 111.

Rev. Act, 1926, Sec. 214 (a) (4) (5); Sec. 234 (a) (4).

Rev. Act, 1924, Sec. 214 (a) (4) (5); Sec. 234 (a) (4).

Rev. Act, 1918, Sec. 214 (a) (4) (5); Sec. 234 (a) (4).

Rev. Act. 1916, Sec. 5 (a) (4) (5); Sec. 12 (a) (2).

In *United States* v. *Mitchell*, 271 U. S. 9, the question presented was whether in calculating the income tax for 1919 the executors were entitled to deduct from the gross income actually received in that year the estate tax which was not paid until 1920. The executors maintained that under Sec. 214 (a) (3) if paid or accrued during the taxable year; and that the tax accruing in 1919, and paid in 1920, was deductible from income received in 1920. This contention was held not admissible.

Under these provisions it was held in *Malleable Iron Range Company* v. *United States* in the Court of Claims (D 510) that the amount of a judgment recovered against a taxpayer appealed from, was deductible for year of final award on appeal, and not until then; and such has been the decisions of the courts and department as shown by the following citations:

Jackson v. *Smietanka*, 272 Fed. 970 (C. C. A. 7th).

Schuster Co. v. *Williams*, 283 Fed. 115 (C. C. A. 7th).

Appeal of Uvalde Company, 1 B. T. A. 932.

Appeal of Ostheimer, 1 B. T. A. 18.

Appeal of Associated Gas & Elec. Co., 2 B. T. A. 263.

Appeal of New Process Cork Co., 3 B. T. A. 1339.

O. D. (Bureau of Internal Revenue), 778 (4 C. B. 141).

Appeal of Richmond Light & Railroad Co., 4 B. T. A. 91.

Appeal of Standard Marine Ins. Co., 4 B. T. A. 853.

Appeal of Hanff Metzger Inc., 4 B. T. A. 1214.

Sol. Op. 923, December, 1919, C. B., p. 108, is much in point. Suit begun in 1914 for patent infringement. Mas-

ter's report filed in 1918; exceptions filed and decree entered in 1919. Books kept on an accrual basis and books kept open. On question whether under Sec. 234, Act 1918, judgment was deductible from income of 1918, the solicitor says:

> "In view of the fact that the determination of the damages in the case by the master was purely advisory to the court, and the court was not in any sense bound to follow such recommendations, the determination by the master, which was subsequently confirmed by the court, cannot be regarded as a determination of the amount. Compare Reg. 45, Art. 111. It is held that the deduction for the year 1918 is not permissible as to the judgment referred to."

Sol. Op. 983, December, 1919, C. B. 217, holds, that where a corporation pays liquidated damages in 1919 to be relieved of a contract to deliver goods in 1918 and 1919, the loss is deductible from 1919 income and not in 1918, under Section 234 (a) (4), Act 1918; the loss was not a *closed* and *completed* transaction until paid. The opinion refers to Law Opinion 777, "that if this office were to proceed upon the theory that if every loss must be charged back against the income of the year in which the operation occurred giving rise to the loss, the administration of taxing acts would be an interminable accounting proposition."

The cases *Sly* v. *Pangborn*, this decision in *Larson* v. *Wrigley*, and the decision in *Macbeth Evans Glass Co.* v. *L. E. Smith Glass Co.* recently handed down by the Circuit Court of Appeals (C. C. A. 3rd) following the *Larson* v. *Wrigley* case here sought to be reviewed, are the only ones, as we recall, which have ignored the principles here urged as reason for decision.

IV.

Income and excess profits taxes are an excise tax upon the Wrigley Company's doing of corporate business and are not deductible under principles of equitable accounting in determining the profits awarded the Larson Company.

It may be conceded that the ordinary expenses incident to the production of an infringing article should be credited to the infringer in an accounting under a decree of infringement where the decree is for profits. The usual State and municipal taxes may safely be conceded to come under this rule.

But an income and excess profits tax is a privilege tax, levied upon the right to do business. The United States is bound, at the time it levies and collects such a tax, to assume that the business is that of the person or corporation doing it. There is no method provided by which the government can at the time of levy and collection determine that the business is a stolen one and carried on for the malicious purpose of forestalling a rival. That is a function inherent in another department of the government, the judicial. As is well known, a person who voluntarily pays the taxes of another cannot, at common law, recover such taxes. We have conceded that a court of equity, with its extraordinary powers, would in an infringement case allow the infringer credit for State and municipal taxes paid; such taxes are upon the property used in the production of the infringing article, and are a part of the overhead, or cost, and the injured party who has sought the aid of such court and thereby expressed his willingness to do equity, as well as receive it, must be held to consent to such payment.

But can any such principle be applied to a privilege tax which does not enter into the cost of the goods infringing?

In other words the tax as levied by the government and paid by Wrigley, was not a direct tax upon these profits nor upon any property of the Wrigley Company. It was an excise tax upon the Wrigley Company's doing of corporate business.

In *Doyle* v. *Mitchell Bros. Co.*, 247 U. S. 179, in discussing certain provisions of the Corporation Tax Act of 1909, it was said (p. 183):

> "An examination of these and other provisions of the act makes it plain that the legislative purpose was not to tax property as such, or the mere conversion of property, but to tax the conduct of the business of corporations organized for profit by a measure based upon the gainful returns from their business operations and property from the time the act took effect. As was pointed out in *Flint* v. *Stone Tracy Co.*, 220 U. S. 107, 145, the tax was imposed 'not upon the franchises of the corporation irrespective of their use in business, nor upon the property of the corporation, but upon the doing of corporate or insurance business and with respect to the carrying on thereof;' an exposition that has been consistently adhered to. *McCoach* v. *Minehill & Schuylkill Haven Railway Co.*, 228 U. S. 295, 300; *United States* v. *Whitridge*, 231 U. S. 144, 147; *Anderson* v. *Forty-two Broadway Co.*, 239 U. S. 69, 72."

In *United States* v. *Whitridge*, 231 U. S. 144, 147, it is said:

> "As repeatedly pointed out by this court, the Corporation Tax Law of 1909—enacted, as it was, after Congress had proposed to the legislatures of the several states the adoption of the Sixteenth Amendment to the Constitution, but before the ratification of that amendment—imposed an excise or privilege, and not in any sense a tax upon property or upon income merely as income. It was enacted in view of the decision of this court in *Pollock* v. *Farmers' Loan & Trust Co.*, 157 U. S. 429, 158 U. S. 601, which held the income tax provisions of a previous law (Act of August 27, 1894, 28 Stat., c. 349, pp. 509, 553, Sec. 27, etc.) to be unconstitutional because amounting in effect to a direct tax

upon property within the meaning of the Constitution and because not apportioned in the manner required by that instrument."

To the same effect is *Anderson* v. *Forty-two Broadway Company*, 239 U. S. 69, 72, where it is said, speaking of the tax law of 1909, that "it is not in any proper sense an income tax law, nor intended as such, but was an excise upon the conduct of the business in a corporate capacity, the tax being measured by reference to the income in a manner provided by the law itself."

We do not understand that the sixteenth amendment to the constitution served any further or other purpose than to relieve "all income taxes when imposed from apportionment from a consideration of the source whence the income was derived." *Brushaber* v. *United States*, 240 U. S. 18; *Stanton* v. *Baltic Mining Company*, 240 U. S. 103. This left such a tax upon the income of a corporation under the Act of 1913, an excise tax as distinguished from a tax on the physical property employed in the business, and as such not a proper item in the determination of the difference between cost and yield, which, under the decisions of this court only are to be considered when seeking profits. (*Rubber Co.* v. *Goodyear*, 9 Wall. 788-804-808.)

The rule of proportion enjoined by the decree, and which the Court of Appeals in its second opinion said was the law of the case and that no application had been made to change it (275 Fed. 535) could not, as we submit, be applied to this excise tax.

As said by Judge Dickinson in *Ellett* v. *Klein*, 22 F. (2d) 807, 814 (D. C. E. D. Pa.): "We are at a loss to see what profits tax has to do with the question under consideration, unless possibly in a secondary sense. We are in search of the sum of the profits. We are thus done with the profits before the tax is levied."

V.

The action of the Circuit Court of Appeals in deducting the excess profits and income taxes paid by the Wrigley Company on account of the infringing business, will result in a wrongful double taxation of the Larson Company, and is otherwise unconscionable and contrary to well-established legal principles.

On the first appeal, the Circuit Court of Appeals determined the rights of the parties and fixed the principles that should govern the plaintiff's recovery (253 Fed. 914). With this the Supreme Court declined to interfere on the Wrigley Company's petition for writ of certiorari (248 U. S. 580). The Circuit Court of Appeals, on the second appeal, reiterated what it had before determined, and made clear again that the Wrigley Company should be treated as the Larson Company's agent. This involved two results—the lesser, that the plaintiff should be made whole; and the greater, that as a matter of public policy, the defendant should not profit by its own wrong.

By these principles, the parties were bound. So was the master. So was the District Court. And so was the Court of Appeals, itself, upon the third appeal. On the third appeal, however, that court was fearful that the wrongdoer might not for a certainty recover that portion of the excise tax which it had paid, computed on the income and excess profits of the infringing part of its business. It expressed that fear in its opinion in the following:

> "The master reasoned that, if required to pay the net profits, unreduced by 'Doublemint's' fair proportion of the tax, Wrigley could deduct the whole amount paid from subsequently returned profits taxes. This would scarcely meet the situation. There may be no profits adequate therefor, in which event the tax thus paid would be lost to Wrigley. But in any event, we do not think it would be equitable as between these par-

> ties to require Wrigley to pay back the full net profits without any reduction for this tax, on the faith that somehow and somewhere and sometime it will be refunded." *Larson Company* v. *Wrigley, Company*, 20 Fed. (2d) 830, 834.)

The considerations of public policy were unheeded, with the result that the agent, The Wrigley Company, is rewarded from the conduct of its principal's business more highly than was the principal, The Larson Company.

The Wrigley Company, the wilful trespasser, knew at all times that in good conscience it was the agent of the Larson Company. It knew that the Larson Company would be required to pay income and excess profits taxes when and as received by the Larson Company. The bill in this cause was filed in 1915. The Wrigley Company paid taxes for the years 1917 and 1918, with full knowledge in equity of the fact that it was an agent, and with actual knowledge of the pendency of the litigation and of the Larson Company's claim therein. On July 30, 1918, the Court of Appeals gave its decision directing the entry of the decree, which, among other things, awarded to the Larson Company all the profits made on the Doublemint business. This was before the Wrigley Company paid any taxes for the year 1918. Before it paid the taxes for 1918, its accounting had been filed before the master and its liability to pay the profits of its principal, the Larson Company, had been fixed. It knew the law at that time. It knew the regulations of the Treasury Department. If, in its assurance, it failed to advise the Government that the Doublemint profits were not its own, there can be found in this no excuse for penalizing the Larson Company.

This hypothetical adjustment of taxes made by the Circuit Court of Appeals, if carried out, must bring the abnormal and unconscionable result—that the Wrigley Company, the wilful, conscious wrongdoer, is to be saved the difficulties, whatever they may be, if any, of un-

dertaking to secure the return of taxes paid by it upon the infringing business, and that the price of this salvation is to be the depriving of the Larson Company of its opportunity to be heard under Sections 327 and 328 of Act of 1918 and to have its taxes "measured by reference to the income in a manner provided by the law itself." (*Anderson* v. *Forty-two Broadway, supra.*) The price further is to be the depriving of the Larson Company of its opportunity to have its excess profits taxes adjusted upon the basis of its capitalization; the price also might be that the Larson Company's taxes will be adjusted for the various years of the accounting period and in relation to its income and other pertinent facts respecting each year, notwithstanding the repeated determinations of the Supreme Court—that the taxpayer must pay upon his income for the year when received. (*United States* v. *Mitchell*, 271 U. S. 9.) Further the price will be that the Larson Company will be subject to an unfair double taxation—and perhaps more—because there is no provision, either in the Acts of Congress or in any pronouncements of this court, that can relieve the Larson Company of its obligation to make return of the income received for the year when at the conclusion of this litigation it is actually received. Further the price is to be that the machinery for making the determinations involved under the system of corrective justice as established by Congress, is to be scrapped and the protection offered the Larson Company instead is one that this court has already said is no protection at all. (*United States* v. *Mitchell*, 271 U. S. 9.)

Also the adjustment ordered by the Court of Appeals departs from the equitable principles governing the accounting as established by the Court of Appeals in this very case upon the first appeal to that court, which principles are as binding upon that court upon the second and third appeals as they were upon the parties themselves.

If the assumption of the cases cited that the Income Tax Act provides with other revenue acts a system of corrective justice consisting of appeals within the executive departments, and bar any remedy by a suit to recover back taxes claimed to be illegally or erroneously assessed or collected; until refund claims have been filed and prosecuted before the Treasury Department and such system of corrective justice is intended to be and is adequate, complete and exclusive, and there is no place in the system for an application to a court of justice until after the payment of the tax, and the Treasury Department has rejected refund claim therefor, or has had the statutory period for the consideration of the same, we submit there can be no excuse for this judicial intervention resulting in possible injury to both litigants, and that the allowance of payments made by the Wrigley Company for account of income and excess profits taxes by the Circuit Court of Appeals should be reversed.

Respectfully submitted,

CHARLES H. ALDRICH,
Solicitors and of Counsel for Petitioner.

GEORGE I. HAIGHT,
CHESTER D. KERN,
RALPH L. PECK,
CHARLES R. ALDRICH,
Of Counsel.

EXHIBIT A.

Extract from Report of Master in Chancery Charles B. Morrison, Esq., (VII—3227-3229).

FEDERAL TAXES.

"Credit was claimed by the Wrigley Company in the filed account, as corrected in the Reckitt report, for $621,108.97, Doublemint's portion of income and excess profits taxes for the years 1917 and 1918, arrived at on the theory that Doublemint profits were the last to be made and should therefore bear the highest rate of tax. The result of this theory is to make the profits on Wrigley's other business bear a lower rate than Doublemint. Obviously this was an improper method and it was later along so conceded. Had Doublemint's share of federal taxes been arrived at in the proportion that Doublemint profits shown in the Reckitt report are of toal profits, the charge would have been $372,942.09.

The federal taxes paid by Wrigley for the years 1917 and 1918, the years in which it concedes profits were made on Doublemint, were paid pending this litigation and with knowledge of Larson's claim. The Court of Appeals on July 30, 1918, handed down its decision directing that a decree be entered granting an injunction and awarding to Larson the profits made on the Doublemint business. Presumably at that time Wrigley had paid the federal taxes levied for the year 1917, but before it paid the taxes for 1918 the decree awarding profits to Larson had been entered, the case referred to the master and Wrigley had filed its account under federal equity rule 63 and had full knowledge of Larson's rights and of Wrigley's liability to pay to Larson the profits on Doublemint. The profits

had at that time been ascertained by Wrigley and no uncertainty remained that Wrigley would be required to pay at least the profits shown in the filed account. It does not appear that when Wrigley paid its taxes for 1917 and 1918 it notified the Government of the pendency of this suit, or that since the decree was entered it at any time informed the Government of the terms and provisions of the decree or took any other protecting steps in its own behalf.

The Wrigley Company now asks that the Larson Company be placed back to the time when Wrigley paid its federal taxes for the years 1917 and 1918 and be required to extend credit in this accounting to Wrigley for the amount of taxes Larson would have been required to pay if the profits had been turned over to it at that time. The law compels Larson to pay taxes on the profit fund that shall finally come into its hands, and if it shall be charged in this accounting with taxes paid by Wrigley, it will be subjected to double taxation.

Under the law, when the Wrigley Company pays the profit fund over to Larson, it may in computing its federal taxes deduct such payment as a current loss from the profits made that year, and if necessary, from the profits made in the succeeding year, and the evidence indicates that the profits for the two years will be ample for that purpose.

If the rates of taxation in force in 1917 and 1918 in regard to federal taxes had remained unchanged, no serious question would have arisen. Substantial justice would have been dispensed by the provision of the law requiring Larson to pay a tax and allowing Wrigley a refund. The situation is complicated by the fact that after Wrigley paid the taxes for which it seeks credit Congress reduced taxes. The effect of the law, if it shall remain unchanged will be to decrease the amount Larson will be required to pay when it shall receive the profit award and also to reduce the amount that will be refunded to Wrigley. However, the

present law may be changed and be materially different when the time comes for applying it to the conditions in this case. Neither side has a vested interest in the law, but must be governed by the law as it exists at the time. *A court of equity may in its discretion relieve hardships resulting from changes in the law, but the facts in this case do not call for a dispensation of that kind.*

In reaching conclusions the case of *Sly* v. *Pangborn*, 276 Fed. 971, affirmed in 284 Federal 271, has not been overlooked. The court in that case allowed federal taxes as an expense and in the decree sought to adjust the equities between the parties by providing for conditions that might or might not arise in the future. An ordinary patent infringement was dealt with and there is nothing to indicate evil intent on the part of the infringer. *Such a case is not comparable with a case where the motive and conduct of the infringement are such as described by the Court of Appeals of this Circuit on both occasions when this case was before that court.*

The Wrigley Company is not entitled to the credit for which it makes claim. It must settle its tax matters with the Government with which it has dealt, and Larson should have the right to settle its tax matters with the Government. A decree such as was entered in the *Sly* case would open the door to further litigation between the parties. This should not be encouraged. If the Wrigley Company, as a result of changes that have been made in the law, is entitled to relief, it must obtain that relief from the Government, and if necessary, courts of equity are open for that purpose." (The italics are ours.)

EXHIBIT B.

WM. WRIGLEY JR. COMPANY
(A Delaware Corporation)
Chicago.

March 10, 1928.

To the Stockholders of
Wm. Wrigley Jr. Company:

We submit herewith the Consolidated Balance Sheet of the Company and Consolidated Income Account for the year 1927. For the first time, the accounts of the Company have been consolidated with its subsidiary companies.

The Consolidated Net Profit for the year 1927, after providing for Depreciation of Plant and Equipment and making provision for Federal Income Tax, amounts to $9,767,347.09. The Net Profit remaining after payment of Dividends for the year amounts to $3,494,390.34 which has been added to surplus and establishes a new record for your Company.

Sales, both domestic and foreign, also reached a new record during 1927, and with business this year showing very favorable results, we have every reason to believe that during 1928 we will have a satisfactory year.

WM. WRIGLEY JR. COMPANY,
PHILIP K. WRIGLEY,
President.

ASSETS

CURRENT ASSETS:			
Cash		$11,002,223.16	
Accounts Receivable		2,472,629.74	
Notes Receivable—			
Under Employes' Stock Savings Plan	$667,044.01		
Other	47,936.27		
		704,980.28	
Inventories at Cost or Market, whichever is lower		10,872,472.64	
Marketable Securities at Cost		4,156,146.31	
			$29,208,452.13
INVESTMENTS IN OTHER COMPANIES			328,154.87
DEFERRED CHARGES			57,468.91
REAL ESTATE, BUILDINGS, MACHINERY AND EQUIPMENT		$18,579,885.33	
Less: Reserve for Depreciation		4,519,714.46	
			14,060,170.87
GOODWILL, PATENTS, Etc.			6,209,614.77
			$49,863,861.55

CONSOLIDATED
for Y

Net Income for the Year before provision for Depreciation, Interest

Deduct: Depreciation
Interest
Federal Taxes

Net Income for the Year

We have audited the books and accounts of Wm. Wrigley Jr. Company and ... 1927, and certify that the foregoing Consolidated Balance Sheet and Income Account of the Company at December 31, 1927, and the Income of the Company for the year whichever is lower. Accounts and Notes Receivable are all considered to be good.

Chicago, Illinois, March 8, 1928.

LIABILITIES

CURRENT LIABILITIES:			
Accounts Payable		$ 2,323,488.39	
Notes Payable		590,000.00	
Reserve for General and Federal Taxes		1,909,697.05	
			$ 4,823,185.44
BONDS OUTSTANDING OF SUBSIDIARY COMPANY.			44,700.00
RESERVES			6,066,669.01
INTEREST OF MINORITY STOCKHOLDERS OF SUBSIDIARY COMPANIES IN CAPITAL AND SURPLUS			1,922,015.02
CAPITAL STOCK AND SURPLUS:			
Capital Stock—			
Authorized—2,000,000 shares of No Par Value			
Outstanding—1,800,000 shares		$15,000,000.00	
Surplus as at January 1, 1927	$20,138,569.19		
Deduct:			
Additional Taxes, etc., for prior years	$ 280,853.70		
Regular and Special Dividend Payable January 1, 1927	1,344,813.75		
		1,625,667.45	
		$18,512,901.74	
Add:			
Net Profit for Year after providing for Federal Income Tax	$ 9,767,347.09		
Less: Dividends for the Year	6,272,856.75		
		3,494,390.34	
		22,007,292.08	
			37,007,292.08
			$49,863,861.55

IDATED INCOME ACCOUNT

for Year 1927

, Interest and Federal Taxes		$12,220,238.69
	$ 817,127.04	
	152,300.92	
	1,483,463.64	
		2,452,891.60
		$ 9,767,347.09

ny and have examined the reports of its Subsidiary Companies for the year ending December 31, e Account are in accordance therewith and, in our opinion, correctly exhibit the financial position the year. The Inventories of Merchandise and materials have been priced at cost or market, be good. Cash in Banks and Securities have been verified.

ARTHUR YOUNG & CO.,
Certified Public Accountants.

NOV 25 1927
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1927.

No. 603

L. P. LARSON, JR. COMPANY,
Petitioner,

vs.

WM. WRIGLEY, JR. COMPANY,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI AND MOTION TO AMEND DECREE.

ISAAC H. MAYER,
WALLACE R. LANE.
Solicitors and of Counsel for Respondent, Wm. Wrigley, Jr. Company.

BURTHORP-DONNELLEY PRINTING COMPANY, CHICAGO.

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(c) The review which we make of the uncontradicted evidence conclusively shows that the Canadian corporation was operated and did business as an independent corporation and in no way as an instrumentality, department, branch, agency or adjunct of the West Virginia corporation, and that the West Virginia corporation neither in fact owned, dominated nor controlled the Canadian corporation...73-74

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1927.

No. 603.

L. P. LARSON, JR. COMPANY,
Petitioner,

vs.

WM. WRIGLEY, JR. COMPANY,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI AND TO MOTION TO AMEND DECREE.

———

The petition for writ of certiorari in this case should be denied because—

(a) The decision of the Circuit Court of Appeals is not final and the case presented by the petition is not one of those "extraordinary" cases where this Court will issue a writ of certiorari in advance of a final decree;

(b) None of the questions which the Circuit Court of Appeals has decided adversely to petitioner and of which complaint is made by it has been decided in a manner at all in conflict with the decision of any other Circuit Court of Appeals, or in conflict with any decision of this Court, or with the weight of authority; nor is the petition based upon any matter in which the Court of Appeals departed from the usual course of judicial proceedings;

(c) The decision of the Court of Appeals, in so far as it is challenged by petitioner, is correct.

I.

The Decision of the Circuit Court of Appeals is Not Final and the Case is Not One of Those "Extraordinary" Cases Where This Court Will Issue a Writ of Certiorari in Advance of a Final Decree.

We are aware that Section 240 of the Judicial Code was amended in 1925 so as to expressly make it competent for this Court to take by certiorari any case, either before or after final judgment or decree, (U. S. C. Title 28, Sec. 347), and that such was the law before the amendment in question. (*Hamilton Brown Shoe Co.* v. *Wolf Bros. & Co.* 240 U. S. 251, 258, and cases there cited). This Court, however, in the *Hamilton Brown Shoe Co.* case, *supra,* while speaking of its power to take jurisdiction to review a judgment of the Circuit Court of Appeals by certiorari, said:

> "As has been many times declared, this is a jurisdiction to be exercised sparingly, and only in cases of peculiar gravity and general importance or in order to secure uniformity of decision * * *, and except in extraordinary cases the writ is not issued until final decree."

The decree which was reviewed by the Circuit Court of Appeals in the present case was entered by the District Court in an unfair competition case which had theretofore been referred to a Master for an accounting of respondent's profits. The decree of the District Court adjudged that the respondent should pay petitioner $1,384,649.12 as net profits, with interest from the date of the filing of the Master's report, and costs (5 Fed. 2nd, 731; R. VII., p. 3365).

Both parties appealed to the Circuit Court of Appeals where all of petitioner's assignments of error were overruled and some of respondent's were sustained, and the case was remanded to the District Court with instructions to allow respondent certain credits which had been disallowed by the District Court. The Circuit Court of Appeals in remanding the case said:

> "We approve the decree of the District Court in all respects, save as to the items of United Profit Sharing Coupons, federal income and excess profits taxes, and rate of interest upon the award; and in order that the decree may be made to conform with our views as above stated respecting these items, and to take further evidence, if deemed necessary, respecting the item of federal income and excess profits taxes, and to make further deductions accordingly from the award as made, the cause is remanded to the District Court with direction further to proceed, and to enter a decree in consonance with these views." (R. XI, 4528; 20 Fed. 2nd. 830, 836.)

The record does not contain sufficient evidence to enable any court to fix the amount to be deducted for the federal taxes, and for that reason the District Court will have to take further evidence. According to the petition for certiorari (pp. 8, 23) the amount which will have to be deducted for that item in accordance with the opinion of the Court of Appeals will be $888,276.52;* and the decree which the District Court will be required to enter against respondent according to the exhibit attached to and made a part of said petition (pp. 23, 55) will be $410,041.32—if, in accordance with the effect of

*Petitioner claims (pp. 8, 23) that this is over $500,000 more than respondent asked for. This statement is inaccurate and is not borne out by the record, as we shall hereafter demonstrate.

the decision of both courts below, losses in the introductory years which were a part of the accounting period are to be allowed as a credit to respondent. The ex parte statement of petitioner that the amount to be deducted for the federal taxes is $888,276.52, and the unsworn report of petitioner's accountants showing that said sum is "estimated," are of course not binding upon respondent.

That the decree of the Court of Appeals is not final is conclusively determined by many decisions of this court, such as,

Martinez v. *International Banking Corporation,* 220 U. S. 214, 222, 223.

Earle v. *Myers,* 207 U. S. 244.

California National Bank v. *Stateler,* 171 U. S. 447.

Guarantee Co. v. *Mechanics' Savings Bank & Trust Company,* 173 U. S. 582.

Georgia Railway & Power Co. v. *Town of Decatur,* 262 U. S. 432.*

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* When the Court of Appeals rendered its first decision in the instant case reversing the decree of the District Court which dismissed petitioner's counterclaim and ordered an injunction and accounting (253 Fed. 914), respondent asked this court to review the case on certiorari (248 U. S. 580). By reference to the files of this court (a practice adopted in *Hamilton Brown Shoe Co.* case, *supra*) the court will find that the present petitioner then successfully opposed that application on the ground that "this decree is not a final one" (answer there filed, p. 2), and further said that this court in the *Hamilton Brown Shoe Co.* case restated "the rule so often declared that except in extraordinary cases the writ is not issued until final decree" (id. p. 2), and that "The Supreme Court will not issue the writ of certiorari to review a judgment of the Circuit Court of Appeals reversing a judgment of the District Court and remanding the cause or further proceedings" id. p. 3. Similar contentions were made by the present petitioner at pp. 23 and 24 of its said answer.

Laying aside for the present purposes the discussion as to whether any of the questions raised by the petition are of a type which would induce this court, after final decree, to issue a writ of certiorari, it is perfectly obvious that there is no question raised by this petition which can be said to be extraordinary so as to call for this court's interposition before a final decree.

In the last analysis the petition merely complains that the courts below allowed too large credits to respondent in calculating its net profits. Petitioner has not referred to a single authority, or given any reason whatsoever why the writ should issue for petitioner's benefit, at least before final decree.

The petition raises no novel question, the decision of which is of importance to the public, or to the administration of justice, or any question which cannot be just as conveniently determined after final decree.

We feel assured that what we have already said is sufficient to persuade the court to refuse this application for a writ of certiorari, but in order that the court may see that no question is raised by the petition of a type which would induce the court even after final decree to issue the writ, we proceed now to examine the rulings of the courts below which petitioner claims to be erroneous.

II.

In an Accounting for Profits, an Infringer is Entitled to Make the Same Deductions Whether He be Innocent or Wanton. Petitioner Also Is Estopped to Ask This Court for Gross Profits.

We wish to impress upon the court at the outset that the accounting in this case involved profits and not damages, and that the authorities uniformly hold that in determining the profits of an infringer the question of willfulness is absolutely immaterial and whatever deductions are properly allowable to an innocent infringer are equally allowable to a willful infringer. Profits are profits and the items that are to be included or deducted in ascertaining net profits are well known and are fixed by numerous decisions. Indeed, if a defendant in an unfair competition suit be an innocent infringer he is not liable to profits at all.*

In the leading case of *Root* v. *Railway Co.* 105 U. S. 189, this court held that an infringer of a patent will be treated as a trustee *ex maleficio,* but only with respect to the profits actually realized from the infringement, and that a court of equity will permit infringers to make deductions for the cost and expenses of the infringing business because it is "thought more equitable to do so" and "in order to mitigate the severity of the punishment to which they might be subjected in an action at law for damages"; that there is "no rule which converts a court of

Saxlehner v. *Siegel Cooper & Co.*, 179 U. S. 42.
McLean v. *Fleming*, 96 U. S. 245.
Fairbanks Company v. *Windsor*, 124 Fed. 200, 202 (2 C. C. A.).
Straus v. *Notaseme*, 240 U. S. 179.

equity into an instrument for the punishment of simple torts"; and that patentees will only be "allowed to claim that which, *ex aequo et bono* is theirs and nothing beyond this"; and that "the adjustment of these profits is subject to all the equitable considerations which are necessary to complete justice between the parties"; and that it "would be a *reductio ad absurdum*" to hold "that there is a fiduciary relation created between him (the patentee) and the wrongdoer by the fact of infringement."

In *Hamilton Brown Shoe Co.* v. *Wolf Bros.* 240 U. S. 251, *supra,* this court reaffirmed the doctrine of the *Root* case, and allowed the cost and expenses to be deducted by a defendant who was found to have willfully and fraudulently simulated plaintiff's trade-mark and entered defendant's territory for the purpose of destroying his business.

In *Tilghman* v. *Proctor,* 125 U. S. 136, a patent suit, this court said (145):

> "It is inconsistent with the ordinary principles and practice of courts of chancery, either, on the one hand, to permit the wrongdoer to profit by his own wrong, or, on the other hand, to make no allowance for the cost and expense of conducting his business."

In *Dowagiac Mfg. Co.* v. *Minnesota Plow Co.* 235 U. S. 641, 647, the court approved the rule so laid down in *Tilghman* v. *Proctor, supra,* and also said that when an infringer of a patent is directed to account for profits "the result to be accomplished is a rational separation of the *net* profits so that neither party may have what rightfully belongs to the other."

In *Christensen* v. *National Brake & Electric Co.* 10 Fed. (2d) 857 (D. C. Wis., Geiger J.) the court, in holding that an infringer accounting for profits

should be allowed interest on invested capital, taxes and insurance, said:

> "There is no such thing as 'infringing' profits or losses,"

and that the infringer is entitled to precisely the same credit for "disbursements" as though he had been in the exercise of a trust "lawfully created."

In *Walter Baker & Co.* v. *Slack,* 130 Fed. 514 (7 C. C. A.), a case in which the defendant was guilty of a deliberate and fraudulent palming off, the court held, that the expenses of the business were just as much deductible as the cost of the spurious article, and that "the net profits accruing to the wrongdoer" are to be ascertained in the same manner as "profits" in any other case.

To the same effect, is *Lee* v. *Malleable Iron Co.* 247 Fed. 795 (D. C. Wis., Geiger, J.), where the defendant was also a willful infringer.

In *A. Mecky Co.* v. *Garton Toy Co.,* 277 Fed. 507 (D. C. Wis. Geiger, J.), the court in a patent case held that the wilfulness of the infringement had no bearing in the determination of the reasonable royalty upon which the damages were based.

The decisions in other circuits are also uniformly to the effect that the question of defendant's willful misconduct is absolutely immaterial in an infringement suit so far as respects the ascertainment of defendant's profits, or even in ascertaining plaintiff's actual damages.

In *McSherry Mfg. Co.* v. *Dowagiac Mfg. Co.* 160 Fed. 948 (6 C. C. A., Judge Lurton sitting), where the defendant had willfully infringed the plaintiff's patent, the court held that in fixing *actual* damages, wantonness was irrelevant and its considera-

tion was merely "calculated to interfere with the free play of one's mind thereon."

In *Gordon* v. *Turco-Halvah Co.* 247 Fed. 487 (2 C. C. A.) the defendant was a malicious infringer, yet in ascertaining his profits he was allowed to deduct taxes, insurance and depreciation, etc.

In *Winchester Repeating Arms Co.* v. *American Buckle Co.* 62 Fed. 278 (Shipman, C. J.), the court expressly refused to examine

> "the subject of the willfulness of the defendant's infringement because the questions under consideration related exclusively to profits."

The cases relied on by petitioner where it was held that the expenses of a defendant were not deductible, were cases in which the plaintiff was seeking to recover (in whatever form it might happen to be) either his own (or his debtor's) property, such as real estate, timber, etc., which had been fraudulently converted or conveyed, or the value thereof. In the case at bar, the Larson Company is not attempting to recover from the Wrigley Company any specific property belonging to the Larson Company which is in the possession of the Wrigley Company, or the value of any of such property. In the conversion or fraudulent conveyance cases referred to by petitioner the courts hold that a plaintiff is entitled to his own property (or his debtor's where necessary to pay the debt) in whatever form it may happen to be, or to its value, and irrespective of the increased value that the defendant has given it.

On the other hand, where, as here, a plaintiff in an unfair competition case asks and is allowed a recovery of defendant's profits, he neither asks for nor receives a return of any of his own property in specie, or the value thereof, but he is merely seeking com-

pensation for the injury done by him by the use of trade insignia, and defendant's profits are allowed only as a measure of such compensation.

In fact, the color scheme in controversy cannot even be said to be the property of Larson Company, inasmuch as Larson has no monopoly on it and anyone has a perfect right to use it, the law merely forbidding its use in such a manner as to be confusing.

The cases from this court to which petitioner calls especial attention in this connection are perfect illustrations of the distinction we are making. Thus *Railroad Co.* v. *Soutter,* 13 Wall. 517, was simply a case where persons who had fraudulently procured property to be conveyed to them were not allowed, when deprived of its unlawful possession, to take credit for an encumbrance lifted by them while the property was in their possession. Neither this nor any of the other cases in which the defendant was not allowed to deduct expenses involved an accounting for profits by an infringer.

Pan-American Petroleum Company v. *United States,* 273 U. S. 456, and the *Teapot Dome* case, decided by this court October 10, 1927, were cases where the Government, as plaintiff, was seeking to repossess itself of its own property which had been taken from it by fraud, and no attempt was made to recover defendant's profits as the measure of plaintiff's compensation.

In the *Pan-American Petroleum Company* case, *supra,* this court held (p. 505, *et seq.*) that the Government did not have to make compensation in a rescission suit for improvements made by a defendant where its laws have been violated; and solely because the Government was plaintiff the court refused the

defendant compensation for improvements. The court very clearly held that if the suit had been one between private individuals such compensation to the defendant would have been allowed. In the later *Teapot Dome* case this court merely applied the doctrine of the *Pan-American* case.

In *Woodenware Co.* v. *United States,* 106 U. S. 432, another case stressed by petitioner, the United States commenced an action in trover to recover its own timber which had been fraudulently cut from its land by one who trespassed thereon. The court held that the defendant, who was an innocent purchaser, stood in the shoes of the fraudulent vendor, and that, therefore, when the Government sued to recover its own property, or the value thereof, no deduction could be made for the labor bestowed or for the expense incurred by the trespasser in fraudulently cutting down and removing the Government's timber.

Petitioner also specially emphasizes *Commonwealth Finance Corporation* v. *McHarg,* 282 Fed. 560 (2 C. C. A.). That was a case where an attorney wrongfully bought for himself, through a dummy, property which he should have purchased for his client. The client merely sought the recovery of property, in specie, to which he of course was clearly entitled.

Petitioner in connection with the subject of gross profits also quotes from *Rubber Co.* v. *Goodyear,* 9 Wall. 788, to the effect that

> "the severity of the decree may be increased or mitigated according to the complexion of the conduct of the offender."

Such a declaration made in a patent infringement suit where, by statute, more than actual damages

may be allowed was not intended to mean that the profits of a wanton infringer are to be measured in any different way than those of an innocent infringer. On the contrary, in the *Goodyear* case, as appears from the quotation appearing in petitioner's brief (p. 55) this court expressly said:

> "Profit is the gain made by any business or investment when both receipts and payments are taken into the account."

And the court laid down, without qualification, the rule that where recovery of profits is sought from an infringer, he is liable only for *"actual"* profits.

Petitioner also quotes in this connection from *Westinghouse Electric Co.* v. *Wagner,* 225 U. S. 604. But the court there was merely considering the question of confusion of infringing and noninfringing profits, and the question of whether a willful infringer may deduct actual expenses was neither involved, considered, or even alluded to in that case.

As the Circuit Court of Appeals for the Seventh Circuit pointed out in *Standard Scale & Supply Co.* v. *Cropp Concrete Machinery Co.* 6 Fed. (2d) 447, the doctrine of confusion "is a method which equity adopts of necessity," and "is not to be applied beyond the point required to bring about the result sought. It 'is not intended to penalize the infringer nor to give the patentee profits to which he is clearly not entitled.' " (Citing the *Westinghouse* case.)

Were the law as contended for by petitioner, then this court must have committed error in its decision in *Hamilton Brown Shoe Co.* v. *Wolf Bros.* 240 U. S. 251, where expenses were allowed to be deducted by a wanton infringer. Carried out to its logical conclusion, on petitioner's theory, a willful infringer

should not even be permitted to make any deductions whatsoever from the receipts from infringing sales, not even for the cost of material, or the cost of manufacturing,—deductions conceded to be proper in this case by petitioner.

Petitioner also refers (br., p. 55) to *Hanover Milling Co.* v. *Metcalf*, 240 U. S. 403, and *United Drug Co.* v. *Rectanus Co.* 248 U. S. 90, as justifying its claim for gross profits. That question was not involved or even referred to in either of those two decisions.

Judge Wilkerson, in holding that a willful infringer is entitled to make the same deductions in ascertaining profits as an innocent infringer very clearly pointed out (R. VII, 3385-8; 5 Fed. 2nd 731, 742-3) the distinction between the conversion and fraudulent conveyance cases relied on by petitioner and the case at bar, and then said (R. VII, 3388; 5 Fed. 2nd at p. 743):

> "The rules applicable to assessing damages at law in cases of willful conversion or in determining the rights of a fraudulent grantee who has improved the property which has come into his possession do not apply in determining profits which are to be allowed in a decree in an equity suit as an equitable measure of compensation."

The Court of Appeals in its last opinion in this case said (XI, p. 4520; 20 Fed. 2nd at p. 832):

> "Where the injured party seeks the profits of an infringer he takes the chance of their reduction or even extinguishment through expenses and losses actually incurred, however unwisely or even improvidently, so long only as they were incurred in good faith. * * *
>
> Moreover the very theory on which Larson may recover these net profits from Wrigley is that Wrigley in handling the infringing Double-

> mint gum packages did so as Larson's trustee or agent—albeit,—*ex maleficio*. While equity requires in such circumstances accounting for the profits, equity also allows in reduction outlays in that behalf made in good faith." (R. XI, 4522, 20 Fed. 2nd at p. 834.)

We submit that the foregoing ruling of the Court of Appeals that a wiliful infringer may deduct expenses the same as an innocent infringer is in complete accord with all the decisions of other Circuit Courts of Appeal and with the law as laid down by this court, and therefore affords no reason whatsoever for this court granting a petition for certiorari.

The petitioner did not file any objections or exceptions to the Master's report in which the Master made deductions amounting to $2,292,605.66 from the gross profits (R. VII, 3230), and during his arguments before the Master and the District Court petitioner's counsel, Mr. Aldrich expressly "conceded that neither the Master nor this (District) court would be justified in allowing to the L. P. Larson Jr. Company the gross profits," (R. VI, 2755) and that "it was the duty of the Master and the court to allow said Wrigley Company to deduct from said gross profits all overhead, advertising and other proper expenses." (R. VI, 2755.)

Petitioner's counsel, Mr. Aldrich, also admitted in the Court of Appeals that petitioner was "foreclosed" from asking that court for gross profits by its failure to file objections and exceptions to the Master's report, and that petitioner was not in a position to ask the Court of Appeals to amend the decree by striking therefrom the provision requiring

"proportionate deductions for overhead, advertising, and other proper expenses."*

Mr. Aldrich also took the same position in the instructions which he asked the Master to give to the accountants. (R. III, 1153-1158.) Besides, Mr. Aldrich admits (br. 6) that he prepared the decree of reference (R. I, 515) to which the petitioner has heretofore never made any objection, and which directs "proportionate deductions for overhead, advertising and other proper expenses." (R. I, 517.)

A claim never presented to, ruled upon, or forming the basis for an exception taken in the lower court is not open for review in this court.†

As Judge Wilkerson said on this point (R. VII, 3386, 5 Fed. 2nd at p. 742):

> "The interlocutory decree here was entered at the instance of the Larson Company * * *.
>
> If the position of the Larson Company is correct the long accounting proceeding was unnecessary. There was no controversy as to the amount of the gross sales and manufacturing cost. No application was made to modify the interlocutory decree. It cannot be that under the rules of equity procedure Larson Company having adopted the basis for relief set out in the form of interlocutory decree which it tendered and having obtained an accounting on that basis, will be heard to say that it is entitled to have its recovery determined upon different principles and measured by a different standard."

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*Petitioner's opening brief filed in Court of Appeals, August 20, 1926, pp. 2, 3, on its appeal from the District Court's money decree.

† *Morrill* v. *Jones*, 106 U. S. 466; *Harding* v. *Giddings*, 73 Fed. 335, 341 (7 C. C. A.); *Adams* v. *Shirk*, 117 Fed. 801, 803 (7 C. C. A.); *New Amsterdam Casualty Co.* v. *Farmers Co-op. Union*; 2 Fed. (2nd) 214, 218 (8 C. C. A.).

Petitioner attempts to excuse its present repudiation of the decree which it prepared and had entered and which provided for deductions from gross profits, by constant references throughout its petition and brief (pet., p. 13, 5, 21; br. 5, 6, 37, 56, 58) to "brazen attempts" to impose on the courts and the Master and "to corruptly influence the Court's accountant," perjury, etc., etc., and petitioner even goes to the extent of basing some of its charges on matters which it merely "sought to prove," while another, such as the alleged "threats to ruin Mr. Larson," are based exclusively on an *ex parte* affidavit (R. VII-3073) filed by petitioner without leave of court in the mandamus proceedings in the Court of Appeals in which, without referring to any person by name so that he could be contradicted, Mr. Larson said he had been advised by the "Wrigley interests" that if he did not drop the litigation he would be injured in reputation and would have to spend ten more years in litigation and this alleged threat, petitioner never even offered to prove before the Master so there never was any need or opportunity on the part of the Wrigley Company to disprove the charge.

Eliminating for the moment the Pulver matter, all charges of misconduct were shown by respondent to have been so absolutely unwarranted and groundless that petitioner did not even file an exception to the Master's report in which no reference was made to any of them.*

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* We shall show the utter falsity of the charges made against the witness Stanley when we come to discuss the item of advertising. They are but a repetition of the charges urged before the Master, the Distrct Court, and the Court of Appeals, and there considered to be without merit.

The same charges were vigorously pressed by petitioner upon the District Court and Court of Appeals, but both courts totally ignored them.

The so-called Pulver matter was before the Court of Appeals on the first appeal and is the only matter which has ever subjected the Wrigley Company to any criticism in the whole course of this litigation and at the proper time we shall show conclusively that the Court of Appeals entirely misconceived the evidence with respect thereto.

When petitioner's counsel (Mr. Aldrich) drafted and had the accounting decree entered, he was fully aware of the Pulver matter, which, in fact, had already been fully set up in petitioner's amended answer filed as early as April 18, 1914, to Wrigley Company's first Bill of Complaint. That matter and the charges of alleged misconduct since the first appeal can therefore afford no excuse for petitioner's present repudiation of its express waiver of gross profits before the Master and in the Courts below and its failure to file exceptions to the Master's report and in no event would they be a legal answer to the proposition that a party can not claim in an appellate tribunal that which he did not claim or which he waived in the court below.

As a last resort petitioner asks this court to allow it gross profits on the theory that relief is sometimes granted on grounds of public policy to a plaintiff who is in *pari delicto* with the defendant (Br. 6). As we have shown by numerous authorities, *supra,* one who seeks an infringer's profits in equity can recover only the net profits remaining after deducting all expenses, and that no rule of public policy forbids the infringer's deducting his expenses, re-

gardless of his conduct. In now injecting the question of public policy into its prayer for gross profits petitioner also forgets that good faith, common honesty and public policy require that when a litigant has once solemnly admitted before a master, a District Court and a Court of Appeals that he is not entitled to gross profits, and has thus, as well as by a decree prepared by him, asked the courts to deduct the infringer's expenses from his gross profits, he shall not thereafter be heard to shift positions, or to complain.*

III.

The Reference in This Case Was Not a Consent Reference and the Master's Report Was "Merely Advisory" to the District Court, Which Could Accept or Disregard the Report According to Its Own Judgment as to the Weight of the Evidence.

We will now show that the Court of Appeals, in its treatment of the master's report with respect to the items concerning which petitioner is complaining, consistently followed the rules of law repeatedly laid down by this court, and that petitioner has totally misconceived the effect of a master's report.

At times petitioner urges that a master's report is unassailable if based upon controverted facts (br. p. 29). At other times he inconsistently cites (br., p. 30) cases (*e. g., Tilghman* v. *Proctor,* 125 U. S. 136, 149, 150) which show that even where the evidence is conflicting, the master's report is not unassailable. Petitioner also admits (br. p. 27) that the Master's

* See cases cited in footnote p. 15, *supra,* holding that a claim never presented to or forming the basis of an exception taken in the lower court is not open for review in this court.

findings of fact may be disturbed where "it is shown that the Master has clearly fallen into a mistake." Petitioner also refuses to recognize the vital distinction pointed out by this Court between cases heard by the chancellor in open court (such as *Conkling Mining Co.* v. *Silver King Coalition Mines Co.,* 230 Fed. 553, 8 C. C. A., and *Wilson* v. *Sands,* 231 Fed. 921, 8 C. C. A. Br. 20), and those cases heard by a master under an order of reference made as here, without the consent* of the parties; and petitioner also fails to distinguish between cases where the evidence is conflicting, and where, as here, it is not.

The Master's report in this case shows that his conclusions are based either on pure questions of law, or on conclusions to be drawn from undisputed facts. There is no dispute with respect to the amount of any of Wrigley Company's disbursements, or for what they were expended. The accountancy questions, viz: the method of allocating advertising expense, the right to deduct interest on capital investment and federal income and excess profits taxes, depreciation of patents, subscriptions, the fixing of the proper amount to allow for overhead, and for contingent liability on account of United Profit Sharing coupons, savings from use of patents, and the question of Larson Company's accountants' fees involve no disputed questions of fact at all.

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*Petitioner has abandoned its contention made in the court below (Vol. VII., p. 3461) that the decree of reference in this case was a "consent" reference. The decree on its face shows that it was entered in accordance with the Equity Rules in order to conform to the mandate of the Court of Appeals. Such a decree is not one entered by consent. *Simmons* v. *Grier,* 258 U. S. 82, 52, 91, *Hapgood* v. *Berry,* 157 Fed. 807, (8 C. C. A. Justice, then Judge, Van Devanter, sitting); Opinion of Judge Wilkerson in instant case (R. VII, 3382).

In its argument on the question of the effect of the Master's report, petitioner has also forgotten the rule laid down in *Texas & Pacific Ry. Co.* v. *Railroad Commission,* 232 U. S. 338; *Washington Securities Co.* v. *United States,* 234 U. S. 76, 78; *Chicago Junction Ry. Co.* v. *King,* 222 U. S. 224, cases cited at p. 15 of the petition. These cases hold that where the two lower courts have concurred upon questions of fact, such findings will not be set aside by this court unless shown to be clearly erroneous, and in *Texas & Pacific Ry. Co.* v. *Railroad Commission of Louisiana,* 232 U. S. 338, that rule was applied even though both lower courts disagreed with a master's report.

Applying the rule laid down in the *Texas & Pacific Ry. Co.* case to the present case, it will be found that with the exception of the item of federal income and excess profits taxes (which involved only a question of law) both lower courts concurred in overruling the findings of the Master with respect to all items of deduction of which petitioner is here complaining. With respect to the item of contingent liability on account of coupons, both courts concurred in finding the Master had decided erroneously; the Court of Appeals, also finding that the Master was in greater error with respect to this item than did the District Court.

Regardless, however, of the doctrine laid down in the *Texas & Pacific Ry. Co.* case it is well settled that as the reference in this case was not a "consent" reference, the Master's report was merely "advisory" to the District Court, and that the District Court had to determine, on its own judgment, the controversy involved.

In the leading case of *Kimberley* v. *Arms,* 129 U. S. 512, this court said (523) that the Master's report

"is merely advisory to the court, which it may accept and act upon, or disregard in whole or in part, according to its own judgment as to the weight of the evidence."

The court also pointed out that an entirely different rule obtains when the parties consent that the issues may be decided by a Master, and held that even in such a case his conclusions are only "presumptively correct" and are subject to be set aside, not, as in the ordinary case where there is no consent, "at the mere discretion of the court," but "when there is manifest error in the consideration given to the evidence."

The doctrine of *Kimberly* v. *Arms, supra,* was reaffirmed in *Davis* v. *Schwartz,* 155 U. S. 631.

In the cases cited in the footnote* the Courts squarely held that where the case is not referred to the Master by consent to hear the evidence and

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*_Denver_ v. _Denver Water Co._, 246 U. S. 178.
Hapgood v. _Berry_, 157 Fed. 807 (8 C. C. A., Justice, then Judge VanDevanter, sitting) also holds that the Chancellor must have had these rules in mind because the decree required the master, as in the instant case, to report the evidence with his findings.
Bosworth v. _Hook_, 77 Fed. 686 (7. C. C. A.).
Blassingame v. _Boyd_, 178 Fed. 1 (4 C. C. A.).
Garinger v. _Palmer_, 126 Fed. 906 (6 C. C. A., Justice, then Judge Lurton, sitting).
Mastin v. _Noble_, 157 Fed. 506 (8 C. C. A., Judge, now Justice Van Devanter, sitting).
Railroad Co. v. _Swasey_, 23 Wall. 405, 410.
Dowagiac Mfg. Co. v. _Deere & Webber Co._ 284 Fed. 311, 345 (8 C. C. A. 1922).
In re Thomas, 45 Fed. 784 (D. C. S. Car).
Holt Mfg. Co. v. _Best Gas Traction Co._, 245 Fed. 354 (D. C. Cal.).
Berlin v. _Evans_, 300 Fed. 667 (D. C. Pa., 1924).

decide the case, a master's report is "merely advisory" and "has not the force of a verdict, or the report of a referee, and, on exceptions thereto, the court must determine, by its own judgment, the controversy presented."

None of the cases relied on by petitioner militates against the rule as announced in the foregoing authorities.

Petitioner cites *Adamson* v. *Gilliland,* 242 U. S. 350. That was a case which was never before a Master, but was heard in open court by the chancellor. The decision in the *Adamson* case cites only *Davis* v. *Schwartz,* 155 U. S. 631, where the reference was by consent and where the court, recognized that when the reference is not by consent the Master's report is "merely advisory" to be accepted and acted upon or disregarded by the court "in whole or in part, according to its own judgment as to the weight of the evidence." In the later case of *City of Denver* v. *Denver Water Co.,* 246 U. S. 178, (which was decided in the year following the decision in *Adamson* v. *Gilliland*) the court points out that *Davis* v. *Schwartz* is to the effect that even where a reference is by consent the Master's findings are taken as only "presumptively correct," whereas, "in the ordinary case" the Master's findings are "merely advisory."

Crawford v. *Neal,* 144 U. S. 585, referred to by petitioner (br. 30), was a case in which, unlike here, the report of the Master was concurred in by the trial court, and this court held under such circumstances the report was presumptively correct.

In *Tilghman* v. *Proctor,* 125 U. S. 136, cited by petitioner (Br. 30), the court held that even where

the evidence was conflicting the Master's report was not unassailable.

In *Cramer* v. *United States,* 261 U. S. 219, also relied on by petitioner (br. 30), the case was evidently tried by the court itself. Indeed, in that case this court disagreed with some of the conclusions of both the District Court and the Court of Appeals, and did so after it had reviewed the evidence for itself.

Inasmuch as this court has definitely settled the law respecting the effect to be given a master's report adversely to petitioner's contention, it would be imposing on the time of the court to point out the distinctions existing in each of the decisions of lower courts cited by petitioner.

Petitioner also complains (br. p. 27) that neither the District Court nor the Court of Appeals attempted to show how the Master had erred or misconceived the evidence.

Petitioner cites no rule or authority which requires a District Court or a reviewing court to give reasons for disagreeing with the Master; but were the rule otherwise, it would be entirely immaterial, inasmuch as both the District Court and Court of Appeals pointed out why they disagreed with the Master's report in respect to the items as to which petitioner complains.

This brings us to a consideration of the propriety of the deductions allowed to the Wrigley Company by the courts below, and we proceed to show as briefly as possible that all of the deductions were made in accordance with principles laid down by this court, and present no question justifying a review by a writ of certiorari on petitioner's application.

IV.

The Accounting Decree in This Case Directing "Proportionate Deductions for Overhead, Advertising, and Other Proper Expenses" Does Not Require the Advertising to Be Apportioned on a Sales Basis; and Even If It Did, the District Court Had the Power and It Was Its Duty at the Coming in of the Master's Report to Allocate the Advertising on a Proper Basis.

Petitioner urges that neither the District Court nor the Court of Appeals had the right or power to allocate advertising and other expenses incurred in the manufacture and sale of Doublemint gum on any other than a sales basis in view of the accounting decree which directs the Master to ascertain the profits, if any, accruing to respondent

> "from the sale of Doublemint as contradistinguished from the other brands of gum made by said Company during the period, making proportionate deductions for overhead, advertising and other proper expenses."

There is nothing in the decree stating that the proportion of advertising chargeable to Doublemint shall be the proportion which Doublemint sales bore to the total sales of all brands. The decree simply directs the ascertainment of profits earned by Doublemint as contradistinguished from the other brands, and provides that in finding those profits there should be "proportionate deductions for overhead, advertising and other proper expenses." The first definition of the word "proportionate" in Webster's New International Dictionary (1924 Edition) is: "Adjusted to something else according to a proportion."

The trial court which entered the decree has determined the standard by which the "proportionate deductions" should be measured. It was properly left for the Master, in the first instance, and then for the court to find, from the evidence, what the proper proportion is. When the decree was entered the District Court had heard no evidence as to the nature of any expenditures, and the court manifestly could not then have known what specific expenses had been incurred, or whether some expenses should not be distributed on a production basis, others on a sales basis, and still others on a basis of profits. "Proportionate" deductions are to be made not merely for "advertising," but also for "overhead and other proper expenses"; and if "proportionate" means on a sales basis for any one of those items, it must necessarily mean the same thing for all of them, and under such a construction expenses such as material and labor incurred specifically and wholly in connection with an infringing article, could not be deducted *in toto,* or otherwise than on a sales basis, and petitioner's counsel is not objecting to the propriety of such deductions. It is an insult to the intelligence of Judge Carpenter to assume that he intended to adopt a rule so inequitable and so in conflict with all the authorities *infra,* which hold that expenses incurred specifically for an article should be wholly charged to it, and that only general expenses which pertain alike to the entire business should be charged on a sales basis.

Indeed, petitioner did not even object or except before the Master to his allowing various credits to Doublemint on a basis other than a sales basis. Thus, petitioner itself suggested that the allowance to Doublemint for the contingent liability on account of outstanding unredeemed coupons should be on a basis

of 33 1/3 per cent, whereas on a sales basis it would have been only 15.74 per cent. (R. X., p. 4152: VII. 3207.)

The District Court, in overruling Larson Company's contention as to the interpretation of the decree, was clearly right when it said (R. VII, 3393):

> "The term 'proportion' means the portion which falls to one's lot when the whole is distributed according to a rule or principle. The interlocutory decree does not determine the rule or principle by which the expense for advertising is to be apportioned. Obviously, the correct rule is to determine the part of the total amount expended for advertising which was spent by Wrigley Company in advertising * * * a product which was held by the Circuit Court of Appeals to be Larson Company's product in the eyes of the trade. * * * Whatever amounts were expended in good faith in advertinsg Larson Company's package are proper deductions here."

If the decree had, in fact, directed a deduction, on a sales basis, of expenses specifically incurred in connection with Doublemint, whether for advertising or otherwise, the decree would not only have been clearly erroneous and contrary to the authorities, but it would have been open to the District Court on the coming in of the Master's report and to the Circuit Court of Appeals, to correct it by adopting the proper rule. (*Mosher* v. *Joyce,* 51 Fed. 441, 443, 444 (6 C. C. A., Circuit Justice Brown, Judge, now the Chief Justice Taft, and Judge, later Mr. Justice Jackson, sitting.)*

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* There are also numerous cases holding that even where the Court of Appeals affirms a decree of the Dis-

As shown by the authorities in the last footnote, prior to its last decision, the Court of Appeals could not, and as a matter of fact it did not decide any question of accounting, or with respect to what deductions from gross profits should be made, or how they should be distributed.

We proceed now to show that this court and numerous Circuit Courts of Appeals have very definitely settled the question as to how to allocate expenses incurred by an infringer who does both an infringing and non-infringing business concurrently, and that the method adopted by the Master and substantially

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trict Court directing an accounting which is limited in any way, nevertheless, the District Court may modify or ignore the limitation, on the theory that questions of accounting would naturally not arise in the Appellate Court until after an accounting has been had and the District Court has first passed thereon. *Racine Engine & Machinery Co.* v. *Confectioners Co.*, 234 Fed. 876 (7 C. C. A.); *Flat Slab Patents Co.* v. *Turner*, 285 Fed. 257 (8 C. C. A.); *Fahrney* v. *Ruminer*, 153 Fed. 735 (7 C. C. A.); *Lederer* v. *Garage Equipment Mfg. Co.*, 235 Fed. 527 (7 C. C. A.). Indeed the Circuit Court of Appeals on the second appeal in this case held that the order directing the Master to take the account was interlocutory, and no question arising out of the accounting was reviewable by it until the District Court had disposed of the Master's report. (To the same effect is *In re Potts*, 166 U. S. 265). In view of the foregoing principles, the Court of Appeals on the first and second appeals could not have decided what rules of allocation should be applied to expenses, and we need spend no time therefore in considering the cases cited by petitioner at page 15 of its brief to the effect that when a matter has once been decided by an appellate tribunal, the decision will be regarded as the law of the case on a second appeal.

contended for by petitioner, in allocating advertising expenses was erroneous.*

V.

The Authorities Uniformly Hold That the Cost of Advertising a Business Generally Should Be Charged as a General Expense, and That the Cost of Advertising a Specific Article Should Be Charged Entirely to That Article.

The authorities are unanimous that where an infringer conducts both an infringing and a noninfringing business at the same time, all expenses, whether by way of advertising, or otherwise, incurred exclusively in connection with the infringing article, are to be wholly charged to that article, and at the time when incurred; and it is only the general advertising or general expenses incurred in the conduct of the entire business that are to be charged to the entire business as overhead. No case to the contrary has been cited by petitioner.

In the leading case of *The Tremolo Patent* (*Hitchcock* v. *Tremaine*) 12 Fed. Cases, p. 244 (affirmed by this court in 23 Wall. 518) where advertising, among other items, was involved, Judge Woodruff went fully into the question and held that the proper rule was as we have stated it.

On appeal, 23 Wall. 518, this court expressly approved the rule as laid down by Judge Woodruff.

Flat Slab Patents Co. v. *Turner,* 285 Fed. 257 (8

* In a petition for a writ of certiorari which the Wrigley Company is filing, error is predicated on the partial adoption by the District Court and Court of Appeals of the erroneous method used by the Master in allocating advertising.

C. C. A.) is to the same effect, and is also on all fours with the case at bar. The defendant there was conducting both an infringing and a noninfringing business. The infringing business was 50.83 per cent of the entire business. The master allocated advertising expense on that basis. The Court of Appeals, after examining the advertising matter, determined that it covered both the infringing and noninfringing business, but "was featuring" the infringing business, and that "considering the comparatively much greater space, prominence and emphasis given in the advertising to the infringing construction, it would seem that construction should bear a greater percentage of the expense than the 50.83% applied to other general expenses." And the Court of Appeals apportioned 80 per cent, or nearly 30 per cent more than a sales basis, "as an expense item against the infringing business."

In *Metallic Rubber Tire Co.* v. *Hartford Rubber Works Co.,* 275 Fed. 315 (2 C. C. A.) the court treated advertising expenses as any other expense item, and charged the infringing article with all moneys spent "in the sole advertising" thereof, and held that the "amount expended for general advertising purposes" should be prorated on a sales basis.

In *Coffield Motor Washer Co.* v. *Wayne Manufacturing Co.,* 255 Fed. 558 (8 C. C. A.), where defendant willfully infringed plaintiff's patent, although the infringing business was only 2.48% of the entire business, yet the court allowed over 33% for advertising.

In *Gordon* v. *Turco-Halvah Co.,* 247 Fed. 487 (2 C. C. A.) another case where the defendant willfully infringed plaintiff's patent, only "general" advertising was involved. The court therefore held it

should be treated the same as any other general expense, saying:

> "The advertising of a business is a necessary expense, and must be reasonably regarded as one of the means by which the profits arise. There is no reason to distinguish between it and any other expense by which sales are made, such as salesmen's commissions, or salaries, or the like."

It will be observed that none of the authorities justify either the amortization of advertising expenses, or the charging of the expense of advertising a specific article, on a sales basis. No one could very well dispute that if a salesman was employed only to sell the infringing article, his entire expenses should be charged to that article and not to the whole business generally. Visual advertising of a specific brand is nothing more than a silent salesman employed exclusively to sell that brand. The authorities we have cited show that the courts recognize what has been so conclusively proved by the uncontradicted testimony in this case, viz: the self-evident fact that a manufacturer may spend a tremendous amount for advertising one product and get only meager sales, while the same amount expended for advertising another product may bring tremendous sales, and that therefore the relative sales of the two products advertised is not a fair or proper criterion for determining the amount to be charged for advertising the two products.

In line with the authorities above referred to, the Wrigley Company insisted on the adoption of the well recognized space method in allocating its advertising, viz: where Doublemint alone was referred to in an advertisement, the entire cost was charged to Doublemint; where Doublemint and one or more

brands were advertised in a single advertisement, the total cost was ascertained and then prorated between the brands named in the advertisement in proportion to the actual space occupied by each. (R. 3647; 3697-9)

The advertising managers of many of the heaviest and most responsible advertisers in the country* were called as witnesses by the Wrigley Company, (none were called by Larson) and they all approved of the space method, and testified that, regardless of how conspicuously the firm's name may be printed they actually used the space method in their respective businesses in order and as the only proper method to determine the actual profits earned by the various articles advertised and that no portion of the advertising expense should be deferred but should be charged at the time it was used.

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*Henry Schott, former Vice President, **Montgomery Ward & Co.**.. (R. IV, 1626-37, 1879-80);

James H. Botz of **Colgate & Co.** (R. IV, 1776-1785, 1793, 1796-1801);

Clinton W. Toms, Vice President, **Liggett & Myers** Tobacco Co., **Chesterfield** and other cigarettes (R. IV, 1661-1674, 1676, 1679);

Lee Joseph Hart, Treasurer, **Park & Tilford** (R. IV, 1644-1648, 1650-1651, 1653, 1656-7);

Benson H. Rowley, of **Joseph Dixon Crucible Co.** (R. IV, 1690-1693, 1695);

Louis C. Reick, of **Corn Products Refining Co.** (R. IV, 1728-1735, 1739);

Harold A. Lebair, of **Sherman & Lebair** Advertising Agency (R. IV, 1801-1809, 1816-1817, 1821-1824, 1827);

Alfred C. Mace, of **National Biscuit Co.**.. (R. IV, 1702-1712, 1715-1718, 1722, 1724-1727);

Joseph M. Kraus, of A. Stein & Co., **Paris Garters** (R. IV, 1598-1600, 1607-1608, 1610-15).

The Wrigley Company very carefully ascertained the exact cost of each advertisement, accurately measured each advertisement and allocated the cost thereof on the space basis. (R. IV, 714, 717, 711, 797, 723, 647, 651, 767, 803, 773, 796, 842-856; V, 2120-2186; VIII, 3647.)

The Wrigley Company charged Doublemint with $2,872,844.43 as its share of advertising allocated on the space basis (R. VIII, 3697).

The master found that the Wrigley Company expended for certain specifically mentioned advertising during the accounting period, $6,798,662.73. Only $21,171.67 of this amount was expended for advertisements that made no reference at all to brands, and this was admittedly institutional, as distinguished from brand advertising, and was so treated by the Wrigley Company. The master, however, contrary to the authorities, *supra,* and to the uncontradicted evidence of all the advertising experts,*

* As an illustration: **Clinton W. Toms**, Vice-President of **Liggett & Myers** Tobacco Co., a company which for more than ten years had expended more than $5,000,000 yearly in visual advertising, said that no advertisement which mentions a product is institutional because the advertiser "is trying to sell his product and not his name", and that his company could not sell any of its **Fatima** or **Chesterfield** or **Piedmont** cigaretts without mentioning the brand; that the advertisement of Liggett & Myers in prominent type ceases to be institutional if the name of the product is mentioned because it is then "attempting to sell the product that was advertised in connection with the name." (R. IV, 1684, 1685); and that the Wrigley Company was advertising specific products and not its name. (R. IV, 1666.)

Lee Joseph Hart, a certified public accountant of many years' experience, treasurer and comptroller of **Park & Tilford**, testified, he had "never seen a case where it (advertising) had a deferred or residual value", and never knew of a concern

considered that all the advertisements, even though they mentioned brands, must be treated as general advertising of the Wrigley institution as distinct from the brands mentioned.# He then adopted arbitrary percentages† and applied them to all the advertising, even to $554,958.38 advertising which mentioned Doublemint only (VIII, 3652) and even to

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"that did defer any part of the advertising expense". (R. IV, 1650, 1657).

Henry Schott, in charge of **Montgomery Ward & Co's.** advertising for many years, testified that where a specific product is mentioned the entire expense should be charged to that product regardless of the prominence given to the name of the institution; that the use of the word "Wrigley's," in large type in some of the advertisements, merely identifies the specific articles mentioned therein; that the Wrigley Company was advertising its brands and nothing else. (R. IV, 1635-9; 1877-8.)

The Wrigley Company made a careful measurement of the actual space occupied by the word, "Wrigley's," howsoever large or small and wherever it appeared in any part of any advertisement apart from the picture of the package; and the exact cost of the space so measured, which was included in its charge of $2,872,844.45 to Doublemint was not in excess of $186,572.27 (Wrigley Exh. 65, Stanley 6 and 15; R. VIII, 3644; IX, 3649; V, 2130, 2131, 2134, 2201-2205).

† The Master concedes (R. VII, 3211) that he did not have specimens of all the advertising before him and the Master apparently made his separation merely from examining photographic copies of the advertisements. He did not even know the cost of each of the advertisements and so of course would reach an erroneous conclusion as to the amount expended for institutional advertising, even if he had made accurate measurements and used correct percentages.

The Master also said (R. VII, 3210) "It is impossible to divide advertising cost with reasonable accuracy" by the space method. At the same time he said that "a separation of institutional and brand advertising" has been made by him with "reasonable accuracy."

$308,219.51 worth of Doublemint gum given away as samples* and thus found that $5,265,222.41 visual advertising contained the so-called institutional advertising to the amount of $2,308,944.72 or 43.853% during the accounting period, and he then amortized that sum over a four-year period, and then allocated, on a sales basis the portion, $1,311,698.09, which he so found fell within the accounting period and he totally disallowed the balance of $999,769.29 (R. VII, 3214). The result was a charge against Doublemint of only $205,079.78 on account of said so-called $2,308,944.72 institutional advertising. The District Court adopted the Master's figures with respect to the amount of the so-called institutional advertising, and amortized it on the same basis as the Master. With respect to the balance of the advertising, however, which the Master and the District Court both found was "brand" advertising, the District Court and Court of Appeals disagreed with the Master and held that the brand advertising should be allocated on a space and not on a sales basis.

The petitioner also asserts that the sales method should have been applied because of the alleged unreliability of Mr. Stanley who testified with respect to the amount of the Wrigley Company's advertising.

Petitioner's attack on Mr. Stanley's credibility is

* Although the Wrigley Company paid out $152,538.53 for advertising containing nothing but Doublemint in 1914, and also expended in that year $151,175.81, the cost of Doublemint Gum given away, nevertheless, the Master allowed only a total of $133,668.54 for Doublemint advertising in 1914. (R. VII, 3230)

mainly based upon petitioner's frequently repeated charge (Brief, pp. 26, 37, 41) that Mr. Stanley said:

> "You can make up an advertising account just as you please and include what you want and exclude what you want."

The uncontradicted evidence shows,—and this is not disputed by petitioner,—that the captions under which the Wrigley Company charged various advertising expenses on its ledger differed entirely from the headings used in its filed accounts, and that the Wrigley Company had to dissect the accounts on its ledger and distribute the items under different, but appropriate headings in the filed account. (R. II, 652; V, 2264; II, 707, 681.)

In answer to Mr. Aldrich's questions on cross-examination, Mr. Stanley said (R. II, 707):

> "In some instances in preparing the account filed with the Master we placed items under what we regarded the appropriate headings, regardless of what accounts they were under in our books, or whether they were in our manufacturing books or downtown books."

It was while Mr. Stanley was explaining (R. II, 707) *et seq.*, how some items which had been arbitrarily put under certain headings in the Wrigley books, had, in the filed accounts, been put under their proper headings that Mr. Stanley made the statement upon which petitioner bases its charge. When, however, the testimony is read which immediately precedes and follows the language quoted by petitioner (Brief, p. 41) there is immediately disclosed the great care which was exercised by the Wrigley Company in going through the various accounts on the company's ledger and segregating therefrom only such items as were properly chargeable to Double-

mint, and it will further appear beyond the slightest doubt that when Mr. Stanley said that "You can make up an advertising account just as you please, and include what you want, and exclude what you want", he was merely referring to the account called "Advertising Account" as it was on Wrigley Company's general ledger, and that he was not referring to the Advertising Account filed with the Master, and that petitioner is making an unwarranted effort to induce the court to believe that Mr. Stanley testified that it did not matter to him what items were charged to the advertising account as filed with the Master.

Petitioner also claims that the space method should be disregarded because it says that Mr. Stanley testified (Rec., II, p. 758) "that the proportional method prescribed by the decree was good accounting practice". (Brief, pp. 7, 16, 37; Petition, p. 19.)

Here again petitioner has misstated the testimony. A reading of Mr. Stanley's testimony (R. II, 758) plainly shows that Mr. Stanley was expressing no opinion whatsoever as to the interpretation of the decree, and that he did not testify that the advertising account should be distributed on a sales basis, but that the expenses which he said should be distributed on a sales basis were general expenses incurred in connection with the whole business.

Petitioner also (Brief, pp. 40, 41) by a reference to the original record before the Master (which is not before this court) attempts to have the court infer that there must be something wrong with the amounts charged by the Wrigley Company to Doublemint for advertising because the Wrigley Company did not also segregate and show separately

the amount expended by it for advertising two of its other brands, Spearmint and Juicy Fruit.

It is a sufficient answer to any such inference that there was never any occasion or necessity for the Wrigley Company to go to the enormous trouble and expense of making such separate tabulations, and Mr. Stanley never pretended that he had ever done so. (R. V, 2168; II, p. 711.)

The record shows conclusively that respondent concealed nothing from petitioner or the Master, and that everything called for was promptly and willingly furnished including Wrigley Company's carefully prepared, full and accurate working sheets.*

These sheets were carefully examined by petitioner's accountants in order to "ascertain whether that (advertising) account is true, or whether the apportionment is right. (R. III, 1150.) Larson's accountants also examined "the different advertising that is embraced in the advertising total charge" and evidently also made measurements (R. III, 1149-51; 1359).

Mr. Vincent, one of Larson Company's accountants, after testifying that the Wrigley Company had furnished him with everything he wanted (R. III, 1223-4; 1237) said (R. III, 1359):

> "So far as I remember, eliminating the question of proper allocation, we found their (Wrigley Company's) work accurate. I am now referring to 'Allowances to Jobbers'. As to all the other items covered by the Wrigley Company report, eliminating the question of alloca-

* Stanley. R. V, 2265-6; 2147; 2151-2; 2160-62; 2168-9; 2171-4; 2178-9; 2182-4; 2185; 2194-5; 2205; 2220-22; 2264; Vincent, R. III. 1123-4; 1237; 1298;1300; 1302-3; 1306; 1308; Hagberg, R. III, 1385-6; 1389; 1393.

tion, we found the Wrigley Company report was accurate."

The charges here made by petitioner against Mr. Stanley were vigorously pressed upon the attention of the courts below, and found to be utterly without merit.

The District Court found (Rec., VII, 3394):

> "That the record furnishes a basis for determining the amounts expended in good faith in advertising Doublemint after the deductions are made for general or institutional advertising,"

and in reaching the amount which the District Court concluded should be credited to Doublemint for advertising, the court said that

> "The accountants have agreed upon this figure if compilations of the witness Stanley are taken as correct, and a careful examination of this record satisfies me that the tabulations on this subject are free from error which will materially affect this result."

The Court of Appeals likewise found that there was no justification for petitioner's condemnation. That court while considering the question of the allowance of Larson Company's accountants' fees carefully pointed out (R. XI, 4759) that the account filed by the Wrigley Company was honest and in compliance with Equity Rule 63 and contained full and correct disclosures, and that as to advertising

> "such data as Wrigley had were without objection or concealment at the disposal of all concerned,"

and that

> "there was no dispute as to the amounts paid, but as to their allocation."

It is therefore in the teeth of the fact that the Mas-

ter relied on Mr. Stanley's figures and both the District Court and the Court of Appeals found them honestly and correctly prepared, and petitioner's own expert accountants admitted them to be accurate, that we still find petitioner saying (br. 39, 40) that the evidence of Mr. Stanley was "manifestly false" and was given in an "attempt to build up this Doublemint account" and that he "made tables and prepared statements with the purpose of deceiving the Master and concealing the truth."

In connection with its discussion of the advertising account, petitioner asserts that $17,378.30 should have been added by the District Court and the Court of Appeals to Doublemint's profits as Doublemint's share of interest earned on invested profits.

There is nothing in the record to show that the District Court and Court of Appeals did not in fact take into full consideration all of the items involved in Doublemint's share of interest earned on invested profits in reaching its conclusions and findings relative thereto.

Besides, petitioner made no specific assignment of error with regard to this alleged oversight, but merely claimed, in assigning error in the Court of Appeals, that the District Court erred in allowing only $26,202.73 for the item under consideration, instead of having allowed the sum of $71,905.74, which is the amount the Master allowed. (R. VII, p. 3463, Assignment of Error, No. 9.) We have no doubt that if petitioner's contention were anything other than an afterthought that it would have drawn the District Court's attention to it, and if it had been

based on an actual error, we would have found an assignment of error specifically describing the $17,378.30 alleged oversight of the District Court.

VI.

The Court of Appeals Committed No Error Against Petitioner in Allowing the Wrigley Company to Charge Doublemint with a Contingent Liability for United Profit Sharing Coupons on a Basis of 45 Per Cent, as the Record Showed that the Wrigley Company Was Entitled to Have That Liability Ascertained on at Least a 50 Per Cent Basis.

Respondent sought to deduct $314,252.03 on account of its contingent liability for about one and one-half billion unredeemed coupons in part of which the five-stick packages of Doublemint were wrapped. These coupons (known as number 1 coupons) are redeemable absolutely and without limit as to time for one-fifth cent each, in cash or merchandise, at the option of the holder.*

As the Master found, at the end of the accounting period there had been redeemed 26.264% of the total coupons issued (Larson Ex. 193, R. X, 4330). Respondent claimed that the total of coupons redeemed during the accounting period, added to those that would be presented for redemption thereafter, would equal at least 50 per cent of all coupons already issued, and charged Doublemint therefor, $314,252.03 as a contingent liability, that amount being the differ-

* Petitioner also issued a coupon (known as a number 5, or dealer's coupons, and of the value of five number 1 coupons) loosely packed in the gum boxes containing twenty packages of five sticks each (R. 685), and also a coupon (known as a number 25 and of the value of twenty-five number 1 coupons) which was given to jobbers' salesmen (R. 687).

ence between the 50 per cent and the amount which had actually been paid for redemptions during the accounting period. There is no conflict in the evidence, the only question being as to the proper conclusion to be drawn therefrom.

The Wrigley Company which at the time of the accounting had had only an eight or nine year experience with coupons took the testimony of a large number of disinterested witnesses who had had a large experience with issuing coupons, trading stamps and the like over a very long period of time, and in many instances under circumstances much less favorable for redemption than those of petitioner. The evidence of these witnesses showed that a reserve on the fifty per cent basis is extremely conservative and that respondent will have to redeem in excess of 60 to 70 per cent of the issued coupons. (R. IV, 1765, 1830, 1838-9, 1870, 1876, 1883, 1890, 1900, 1903, 1930; VI, 2696, II, 670, 756; VIII, 3568, 3557, 3559.)

These disinterested witnesses also testified that a large number of companies issuing such coupons have been eventually compelled to redeem between 65 and 93 per cent of the total, and that in many instances, coupons continue to be presented for redemption in large quantities more than fifteen years after they were issued. (R. IV, 1830, 1838, 1870, 1890, 1903, 1930, VI, 2696.)

We here insert a table which summarizes in convenient form the evidence showing the experience of the United Profit Sharing Corporation, the coupons of which were used by the Wrigley Company and other customers. The table also shows the experience of other dealers who used coupons under conditions very similar to that of respondent.

1. Witness	2. Commodity	3. Minimum Price of Purchase Necessary to Procure Coupon	4. Redeemable Value of Coupon	5. Geographical Distribution of Coupons	6. Number of Coupons Issued	7. Number of Coupons Redeemed
1. United Profit Sharing Corp. (Frederick I. Becton)	Coupons	5c.	1/5c.	National	1,472,946,522*	1,104,206,291*
2. United Cigar Stores Company (Frederick I. Becton)	Cigars, tobacco, etc.	5c. until 1918, 10c. since	1/5c. cash or 3–4 mills in mdse.	National	3,038,389,616†	2,494,081,203†
3. Mutual Profit Coupon Corp. and Schulte Retail Stores (U. M. Reinach)	Cigars, tobacco, etc.	5c. during last 2-4 yrs. 2½c. before then.	1½-1¼ mills in mdse. only.	National	534,418,020	350,977,790
4. Liggett & Meyers Tobacco Co. (Clinton W. Toms)	Tobacco, etc.	5c.	½c.	National	4,700,000,000	
5. Proctor & Gamble Co. (Charles C. Atwood)	Soap	5c.	2–2½ mills, mdse. only	Some National, some only in and about New York State	566,089,980	306,989,568
6. Kirkman & Son (Alfred Bremner and M. H. Richards)	Soap	4½–7c.	2½–5 mills in mdse. 2½–3 mills in cash	Mainly in East	1,185,655,906	908,329,170
7. Arbuckle Bros (Martin E. Goetzinger)	Coffee	20c.–23½c.	During last 8–10 years, 1c. cash, 1–2c. mdse.	National	2,000,000,000 plus	
8. Borden Sales Company (Charles S. Parsons)	Canned Milk	8c.-22c.	3–4 mills mdse. only	No. Eastern Territory. Pa. and S. C.	611,949,850	365,060,157
9. Surety Coupon Co. (Edwin B. Mortimore)	Trading Stamps	10c.	1.85–1 7/8 mills	East and Middle West Cities	5,063,942,651	4,416,489,642
10. Merchants Legal Stamp Co. (Harry C. Brine)	Trading Stamps	10c.	2 mills cash, 2½ mills mdse.	Eastern Mass.	6,025,100,690	5,613,644,830
11. N. K. Fairbanks Co.	Soap	5c.	½c.		182,674,980	84,489,483
12. Wm. Wrigley Jr. Co. (Wm. H. Stanley)	Gum	5c.	1/5c. cash or mdse.	National	6,946,401,888	1,861,501,760

*Does not include coupons issued to Wrigley Company, and includes only coupons issued to customers who paid therefor on delivery.
†"Certificates" equal 5 whole coupons.

3. Minimum Price of Purchase Necessary to Procure Coupon	4. Redeemable Value of Coupon	5. Geographical Distribution of Coupons	6. Number of Coupons Issued	7. Number of Coupons Redeemed	8. Period of Issuance	9. Age of Oldest Coupon Redeemed	10. Per Cent Redeemed	
	1/5c.	National	1,472,946,522*	1,104,206,291*	1914–1922	8 years (original issue)	74.96	1.
until 1918, 10c. since	1/5c. cash or 3–4 mills in mdse.	National	3,038,389,616†	2,494,081,203†	1901–1921	21 years	82.08 (of No. issued since 1907)	2.
during last 2–4 yrs. 2½c. before then.	1½-1½ mills in mdse. only.	National	534,418,020	350,977,790	1915–1920	6 years (original issue)	65.67	3.
	½c.	National	4,700,000,000		1912–1917		72–73	4.
	2–2½ mills, mdse. only	Some National, some only in and about New York State	566,089,980	306,989,568	1903–1916	18 years (original issue)	54.32	5.
½–7c.	2½–5 mills in mdse. 2½–3 mills in cash	Mainly in East	1,185,655,906	908,329,170	About 1890–1920	More than 16 years	76. (of No. issued since 1911)	6.
c.–23½c.	During last 8–10 years, 1c. cash, 1–2c. mdse.	National	2,000,000,000 plus		1895–1922	More than 10 years	71.77 (of No. issued 1908-1921)	7.
c.–22c.	3–4 mills mdse. only	No. Eastern Territory. Pa. and S. C.	611,949,850	365,060,157	1900–1921		59.66 (of No. issued 1910–1921)	8.
c.	1.85–1 7/8 mills	East and Middle West Cities	5,063,942,651	4,416,489,642	1909–1922	13 (original issue)	87.21	9.
c.	2 mills cash, 2½ mills mdse.	Eastern Mass.	6,025,100,690	5,613,644,830	1904–1921	(1904 original issue)	93.00 plus	10.
c.	½c.		182,674,980	84,489,483	1910–1918		46.25	11.
	1/5c. cash or mdse.	National	6,946,401,888	1,861,501,760	September 1, 1914–March 1, 1923		26.947 June 1, 1923	12.

es only coupons issued to customers who paid therefor on delivery.

Petitioner also showed that the Government, after a most careful examination, and taking into consideration the experience of others, has permitted the Wrigley Company to set up for taxation purposes a reserve of 60 per cent. (R. II, 756; VI 2602, 2725).

The Master refused to consider the evidence of the experience of others* and accepted (R. VII 3225) the concession of the Larson Company that "33-1/3 per cent. of the coupons issued will finally be presented for redemption."

The Master accordingly allowed the Wrigley Company to deduct only $98,519.06, the amount conceded by petitioner. (R. VII, 3225).

The District Court, after pointing that there was "no substantial dispute in the evidence introduced on this subject" and that "exact conclusions" are not essential any more than they are in many cases with which the courts have to deal, said (VII, 3292):

> "Many times a rule formulated from past experience must be applied to a present situation. The use of mortality tables is an illustration.
>
> In determining the per cent of these coupons issued in connection with the sales of Double-

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* The Master's accountants suggested that the experience of others should be taken into consideration. They reported:

> "The experience of the Wm. Wrigley Jr. Company with United Profit Sharing Coupons has been over so short a period that it is doubtful if in any event a fair estimate of the liability in respect of unredeemed coupons could have been made, based on Wrigley's figures only; when the conditions prevailing throughout the period 1915-1918 are taken into consideration, it almost becomes necessary to ascertain the experience of some concern doing a national business (and using the classes of coupons put out by the Wm. Wrigley Jr., Company) in years when conditions were more stable." (R. VI, 2924-5.)

> mint which will be redeemed, consideration must be given to the experience of other concerns issuing coupons under trade conditions similar to those in this case. The action of the Federal Government in the administration of federal tax laws in permitting the establishment of a reserve of 60 per cent must be given some weight."

To the same effect is *McFadden* v. *Murdock*, 1 Irish Reports, C. L. 211.

The District Court further said:

> "I am convinced that the per cent fixed by the Master is inadequate and that there should be an addition of at least 5 per cent to the Master's percentage of 33-1/3 per cent."

This resulted in an additional allowance of $64,715.60 to the petitioner.

The Court of Appeals also disagreed with the Master as to the conclusion to be drawn from the undisputed facts, and agreed with the District Court that the experience of others and the action of the Government in allowing the Wrigley Company a 60 per cent allowance on account of this item should be considered. The Court of Appeals then concluded (R. XI, 4754):

> "From a careful review of the situation we are satisfied that the percentage of redemption allowed by the court is still too low and ought to be somewhat further increased. In our judgment an additional 6-2/3 per cent over and above the further allowance by the District Court, making in all 45 per cent, probably would not over-estimate Wrigley's ultimate liability upon the unredeemed coupons, and we are of the opinion that the charge against 'Doublemint' gross profits should be increased accordingly."

Petitioner urges as it did in the lower courts that the confusion with respect to the coupons is such as

to require the application of the rule laid down in *Westinghouse* v. *Wagner,* 225 U. S. 604, 619-622. What the court there held was summarized by it in *Dowagiac Mfg. Co.* v. *Minnesota Plow Co.,* 235 U. S. 641, at p. 647, where it is said:

> "It well may be that mathematical exactness was not possible, but as is shown in *Westinghouse* v. *Wagner Co., supra.,* (pp. 617, 620, 621, 622), that degree of accuracy is not required but only reasonable approximation, which usually may be attained through the testimony of experts and persons informed by observation and experience."

Such was the rule followed by both lower courts. The inapplicability of any doctrine of wilful confusion to this case is also shown by the report of the Master's accountants that the difficulty in the case did not arise from any confusion in the records of respondent (R. VI, 2923).

Petitioner apparently would have the inference drawn (br. pp. 10, 32 pet. p. 6) that credit was given respondent in its account, on the basis of coupons issued and percentage of redemptions for five years following the accounting period, but the record conclusively shows (R. II, 759; VI, 2602) that the amount which respondent set up as a reserve for unredeemed coupons and the decisions of the lower courts are predicated entirely upon the actual amount of coupons issued only during the accounting period (R. II, 759; VI, 2602.) The record shows (Wrigley Exh. 102A; R. IX, 3868) in detail the number of coupons of each denomination issued and redeemed in each year, separately, and the percentages, both annual and cumulative, of the redemptions in each year. In other words,

Doublemint's percentage of contingent liability was confined strictly to the coupons which were issued during the accounting period, and which were still outstanding at the end of the accounting period.

The only reason respondent proving coupons issued or redeemed up to as late a date as possible, was manifestly to disclose to the court the entire experience of respondent so far as possible; and if such proof had been omitted it is not difficult to imagine what charges of concealment would have been directed against respondent.

The fact that after the accounting period, in 1922 two No. 5 coupons were put in each box for about six months in order to increase sales* has nothing whatever to do with the number actually issued during the accounting period. (br. p. 33) The statement made by petitioner in this connection is misleading, for it is apt to convey the erroneous impression that the respondent used two No. 5 (1c) coupons in boxes containing twenty packages of gum during the accounting period, and that respondent failed to take this into consideration in rendering the account of the coupons actually used during the accounting period.

The petitioner would also have it appear (br. p. 32) that the fact that the respondent, after the accounting period, used coupons with six brands of gum instead of with the three it used them with during the accounting period, in some way made the figures furnished by respondent unreliable. The fact is that respondent has made an accurate account of every coupon issued during the accounting period. (Wrigley Ex. 92, Bennington 1, R. VIII, 3726; VI, 2601.) The figures in respondent's account were

* (R. VI 2646-7; 2650; 2686.)

accepted as correct by petitioner when it admitted that 33 1-3 per cent of the issued coupons will ultimately have to be redeemed, and also when it filed no objections and took no exceptions to the Master's report. (R. III, 1416, 1361; VII, 3371.)

The Wrigley Company has specifically separated all of the coupons issued during the accounting period in connection with the sale of its Doublemint gum, and it is on this separation that the Larson Company, the court below and the Master have proceeded. (R. II, 759; VI, 2602.)

The exact number of boxes of Doublemint gum sold during the accounting period was proven by respondent and accepted as correct by petitioner, so that there was not and could not be any controversy as to the number of coupons issued with Doublemint gum, as distinguished from the other brands.

Counsel's inferential suggestion (br. 32) that respondent should have key-numbered its coupons is of no value, inasmuch as the only controversy was as to how much Wrigley will still be compelled to pay out in the future and key-numbering could by no possibility throw any light upon that question; it would merely have entailed a useless, tremendous expense and labor in sorting the hundreds of millions as they were being redeemed.

The Master's accountants said (R. VI, 2923):

> "It cannot be conceived how, by keeping its records in a manner feasible from a commercial as opposed to a theoretic standpoint the Wm. Wrigley Jr., Company could have given any assistance towards the solution of the difficulty."

Counsel here, as they did in the court below, also lay much stress upon the fact that a 33 1-3 per cent ratio

of redemptions to issues would not be reached for 45 years, if the increase in the ratio should continue at the same rate as between December 31, 1918, and May 31, 1923, or on an average of fifteen and one-half hundredths of one per cent (.155 of 1%).

Petitioner has failed to draw the court's attention to the uncontradicted evidence that during the war the price of merchandise doubled and trebled, and this increase and the consequent increase in the number of coupons necessary to procure the premiums, made it take the collector much longer to collect the number of coupons necessary to procure a given article than prior to the war, and this also naturally resulted in persons holding coupons for redemption until the exchangeable merchandise became lower in price. Besides that, millions of men, many of whom had been coupon collectors, were abroad during and after the accounting period. (R. II, 674, 756-7; IV, 1899.)

Respondent's coupons were distributed in every village, town and city in the United States in approximately six hundred thousand stores, the great bulk of which were in territory where there were no redemption stations, and where the facilities for redemption were poor. (R. V, 2190-1.) The fact that respondent was well known as a reputable and successful institution, having a stable business, also assured collectors that they were safe in holding them.

It was the experience not only of respondent but also of the other concerns issuing coupons that the years 1919 and 1920 showed a heavy falling off in the ratio of coupons redeemed to those issued, and that was but a natural result of the war.

As a matter of fact the ratio of respondent's re-

demptions to issues was actually increasing at the rate of about one per cent a year beginning with the year 1921, thus (R. X, 4330; VI, 2707-8):

At the end of 1920, the ratio was 24.468%.
At the end of 1921, the ratio was 25.419%.
At the end of 1922, the ratio was 26.547%.
At the end of May, 1923, the ratio was 26.947%.

The only ground that the Master had for adopting the 33 1-3 per cent basis was the unsworn report (Larson Exh. 132, R. X, 4136) of Touche-Niven & Co., Larson Company's accountants, which arbitrarily says (R. X, 4150, 4152) that 33 1-3 per cent is ample. The worthlessness of that statement appeared when the makers thereof were examined under oath.

Charles R. Whitworth, the member of Touche-Niven & Co. who had charge of making the report, when examined under oath gave it as his opinion that 33 1-3 per cent of the coupons that had been issued by respondent "and were outstanding at the end of the accounting period will be redeemed." (R. III, 1416.) Such a formula would result in an allowance in excess of the amount which the Wrigley Company set up in its filed account. This witness also at one time said that his conclusion regarding the amount of this contingent liability was based "on the practices of others" (R. III, 1413) and when asked for the names "of others" he refused to give them (R. III, 1413-14), and later he said his conclusions would not be affected by the experience of others. (R. III, 1415.)

W. W. Vincent, an employee of Touche-Niven & Co., who prepared that part of their report which dealt with the United Profit Sharing Coupons, was also thoroughly discredited. Among other things,

he repeatedly unqualifiedly swore that he had no experience at all with any concern that handled coupons with the exception of the present case (R. III, 1204), and, that he had made no investigation and knows of none made as to coupons issued by any other concern than Wrigley's and he said: "We had no statistics on what other institutions redeemed." (R. III, 1361-3; 1366; 1204.) An admission was finally forced from him, however (R. IV, 1622), that at the very time he was preparing the Touche-Niven & Co. report he had before him working sheets relating to coupons of an exchange value of 1-2 cent each issued by N. K. Fairbanks & Co., soap dealers, with their five-cent packages of soap. Those sheets, which were afterwards introduced in evidence by respondent, showed the number of coupons annually issued and annually redeemed by that company between 1910 and 1920, both inclusive, in connection with each of several brands of soap, separately and together. (R. IV, 1622-4.) Those sheets also show the "per cent to number issued" of the annual redemptions and that the percentage of redemptions to the issues in connection with one brand of soap was 51.93 per cent, and 41.81 per cent in connection with another brand, and that 46.25 per cent of all coupons issued with both brands was redeemed. (R. IV, 1622-4; VIII, 3520-1.)

We respectfully submit that the Court of Appeals was fully justified in allowing to the Wrigley Company a deduction on a 45 per cent basis and insist that error was committed in not allowing the Wrigley Company a deduction on a basis of at least 50 per cent which it claimed.

VII.

The Court of Appeals Has Properly Held That Respondent Is Entitled to Deduct Doublemint's Portion of Federal Income and Excess Profits Taxes.

Respondent, in its filed account claimed a credit of $621,108.97 on account of Doublemint's portion of federal income and excess profits taxes. These figures were based upon Wrigley's calculations in its filed account as to the amount of Doublemint profits, and were prepared on the theory that Doublemint profits, being the last to be earned, should fall within the highest bracket. Respondent also offered, but because of the Larson Company's objection, was not allowed by the Master to prove that petitioner would have had to pay the Government an amount equal or in excess of that deducted by the Wrigley Company in its filed account for these federal taxes if the petitioner had received the supposed profits when and as earned. (R. VI, 2507-8; 2462-4; 2468-9).

In 1920, after the accounting period, the Wrigley Company sought a rebate from the Government on account of overpayment of taxes for the years 1914 to 1918. This claim was allowed by the Government to the extent of $422,223.64, of which Doublemint's share was $70,047.62 so that the amount of $621,108.97 claimed as Doublemint's share of the taxes in question in the filed account was reduced to $551,061.35, and the court below was duly advised by respondent of this situation.

Respondent has never yielded its contention that it was entitled to deduct from Doublemint profits whatever amount it paid thereon to the Government for federal income and excess profits taxes, and respondent has always insisted that the Doublemint profits should bear the highest rate of tax, and that if Dou-

blemint profits are to be increased over that shown in its filed report then the taxes to be charged against Doublemint must be increased accordingly.

Petitioner misstates the fact when it says (br. p. 48) that respondent only claimed that the amount paid by it for these taxes was only $372,942.09. That was the amount which Wrigley Company's accountant testified would be deductible on the assumption that the profits were as shown in Wrigley Company's filed account, and were allocated according to the rule laid down in *Sly Mfg. Co.* v. *Pangborn Corp.*, 276 Fed. 971, (affirmed 284 Fed. 217, 4 C. C. A.), viz., by charging Doublemint with the same proportion of the total taxes as Doublemint's profits in 1917 and 1918 (the only two years of the accounting period when any Doublemint profits were shown) bore to Wrigley's total profits in those two years.

We are constrained to mention these facts in detail because of the repeated statement in the petition and brief (pet. pp. 8, 23; br. pp. 12, 48) that the decision of the Court of Appeals with respect to this item allows the Wrigley Company to deduct more than $500,000. in excess of what it claimed the right to deduct therefor.

The law is well settled that in order to ascertain net profits these federal taxes must be deducted the same as any other kind of tax;* and petitioner has cited no case to the contrary.

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* *Galveston Electric Co.* v. *City of Galveston*, 258 U. S. 388; *Georgia Railway & Power Co.* v. *Railroad Commission*, 262 U. S. 625, 633; *Consolidated Gas Co.* v. *Newton*, 267 Fed. 231, 259 (D. C. N. Y. 1920); *Neeson* v. *Sangamon County Mining Co.*, 316 Ill. 397; *Swaller* v. *Williamson Milling Co.*, 116 Kansas 329; 226 Pac. 1001; *Ransome Concrete Machinery Co.* v. *Moody*, 282 Fed. 29 (2nd C. C. A. 1922); *Kaufman* v. *Bowers*, 11 Fed. 2nd 622 (D. C. N. Y.); *Patton, etc. Syndicate* v. *Etherington* (1919), 1 Ch. 306; *Vulcan Motor Co.* v. *Hampson* (1921), 3 K. B. 597.

If respondent were compelled to stand the expense of these taxes it would be made liable not only for all actual profits, but also for a sum in addition thereto equal to the amount of taxes paid by it. That it would be without any adequate redress against the Government, and would therefore be unjustly penalized if not given credit for the taxes, is conclusively shown by the decisions, statutes, and regulations of the Treasury Department.*

Petitioner (br., p. 19) states that the action of the Court of Appeals with reference to these taxes is "in violation of statute, regulations, and decisions." This is apparently an attack upon the Court of Appeals' statement that "if it appears that the amount decreed is only what is left after reimbursement to Wrigley of the Federal tax already paid therein, it is unthinkable that collection of the same tax from Larson would be again undertaken." Counsel forget that, although respondent disclaims guilt and all liability, the Court of Appeals has denied that contention, and, as that court said:

> "The very theory on which Larson may recover these net profits from Wrigley is that Wrigley, in handling the infringing 'Doublemint' gum packages, did so as Larson's trustee or agent—albeit, *ex maleficio.*"

That petitioner will not again have to pay any additional taxes is squarely supported by Article 344

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* *Malleable Iron Range Co.* v. *United States,* 26 C. Cls. 425 (certiorari allowed 273 U. S. 688 and remanded to Court of Claims for further findings, 273 U. S. 674.)
O. D. 1917 (C. B. 4, p. 142).
O. D. 1141 (C. B. No. 5, July-Dec. 1921, p. 134).
Article 52 of Int. Rev. Dept. Regulations 45.
Hayner v. *United States,* 26 C. Cls. 189.
Cum. Bulletin, Dec. 1919, p. 108.
O. D. 1917 (4 C. B. 142).

of Treasury Regulations 69 relating to the 1926 Act. That Article provides that:

> "Where the tax has been paid on the net income of an estate or trust by the fiduciary, the net income on which the tax is paid is free from tax when distributed to the beneficiaries."*

Petitioner and its accountants have wholly overlooked this Article. Otherwise they would not have referred to regulations which have no application where the relationship is one of either agent or trustee.

It is thus indisputable that inasmuch as respondent, as such supposed agent or trustee, has already actually paid the taxes on the very net income which petitioner is now seeking to recover, such income, under the express language of the Treasury Regulations ,"is free from tax when distributed" to petitioner.

The diligence of petitioner's counsel has not enabled them to find a single Regulation, departmental ruling, or decision of any court, holding that when the taxes have once been paid on profits held by one person for another whether as agent, or trustee, the beneficiary must also pay taxes on the same profits when received. The Regulations cited by counsel in no manner, directly or even remotely, pertain to the rule applicable in such cases.

Petitioner's argument is also fundamentally unsound because it wholly ignores the numerous de-

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* To same effect, see:

Treasury rulings, I. T. 1344, Cumulative Bulletin I-1, p. 217; I. T. 1772 Cumulative Bulletin II-2, p. 113; Article 344 of Treasury Regulations 45 relating to the Revenue Act of 1918; Article 344 of Treasury Regulations 62 relating to the 1921 Act; Article 344 of Treasury Regulations 65 relating to the 1924 Act.

cisions of this and other courts that the plaintiff in an infringement suit, if he elects to take profits, must be satisfied with the net profits, and, as the Court of Appeals pointed out, there are no net profits until taxes, the payment of which cannot be escaped, have been deducted.

Touche, Niven & Company's suggestion (Br. p. 50; 48) that petitioner might have paid less taxes by bringing himself within the provisions of Sections 327 and 328 of the Revenue Act of 1918 (which sections were not even in force prior to 1918) is wholly speculative, as the record contains absolutely no showing that the necessary conditions exist to make said sections applicable, or to show that if said sections had been applicable, what the result would have been.

Touche, Niven & Co. also seek to show (Ex. C. to Petition, p. 52) unfairness in the formula suggested by the Court of Appeals by a tabulation intended to prove that petitioner will be compelled to pay a larger proportion of taxes than Doublemint's proportion of profits bears to total profits. It is highly significant that Touche, Niven & Co. failed to make the only comparison which would be proper, viz.: a comparison of what petitioner would have had to pay with the amount that respondent actually paid.

Besides, Touche, Niven & Co. have not even been fair in the comparisons which they did make. Thus, the amount of Doublemint profits used by them is that which results after deducting interest on invested capital and patents, whereas no such deductions have been made from the figures used to show respondent's total profits, and manifestly such a comparison of Doublemint's profits with such total profits is wholly misleading and unfair. In the table

in question Touche, Niven & Co. fix the percentage of Doublemint profits to total profits in 1916 at 8.28 per cent, whereas it should be 12.08 per cent, and this correction, of itself, robs their argument of all force for that year, and shows that as a matter of fact Doublemint's proportion of profits exceeded its proportion of taxes for that year.

Touche, Niven & Co. also suggest that if petitioner had received respondent's profits when made petitioner might have expended more for salaries and advertising, and thus reduce its taxes. Whether or not such expenditures would have been made, and what the results thereof would have been, are purely speculative.

We believe we have already sufficiently pointed out that the suggestions made by Touche, Niven & Co., and adopted by petitioner, are so speculative, and that their tables and comparisons are so unreliable as not to require any further consideration.

The action of the Court of Appeals in allowing respondent, as a credit, the tax it paid on profits earned during the accounting period is in no sense the application of any rule retroactively, as petitioner claims (Br., p. 49). Larson elected to take the net profits which Wrigley made during the accounting period, after deducting these taxes, and they must be ascertained in accordance with the laws then in force, and, as the court said, the payment of the taxes was inescapable.

Petitioner also claims (br., p. 51) that Wrigley Company should not be allowed to deduct the tax because it "had never charged it off in its books as a *loss.*" Respondent never claimed that the payment of the taxes was a loss, any more than the payment of

real estate taxes. Petitioner forgets that "the decision must rest upon the actual facts." (*Doyle* v. *Mitchell,* 247 U. S. 179), and not upon book entries. [*Decker* v. *Smith,* 234 Fed. 646 (2 C. C. A.)]

Petitioner also suggests that the Wrigley Company "could recoup its losses, wholly, or in part at least, by deducting its loss in its return for the year."

The only possible advantage the Wrigley Company could have under any circumstances would be a saving of income tax for the year in which the judgment is paid, of not to exceed 13½ per cent (the present rate) of the amount of the judgment, and manifestly there will be no advantage to the Wrigley Company if its other deductions leave it no net income in said year.* Any danger that respondent might derive some benefit which it ought not to retain, could easily be guarded against by a decree providing for the indemnity of petitioner against such Federal taxes as the Wrigley Company may hereafter save because of the payment of any profits.

VIII.

Interest on Total Capital Invested (in Proportion to the Ratio That the Infringing Business Bears to the Whole Business) Is Properly Allowable to an Infringer Accounting for Profits Regardless of Whether the Infringement Be Wanton or Not and Was Properly Allowed in This Case, Both With Respect to Tangibles and Patents.

Among other items which petitioner lists (pet. p. 16) as having been improperly allowed by the District Court and the Court of Appeals are "Interest on capital invested in tangible assets" and "Interest on capital invested in patent rights."

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* See *Malleable Iron Range Co.* v. *United States,* 26 C. Cls. 425 and other authorities cited in footnote on p. 55, *supra.*

Petitioner simply quotes (br. pp. 45-46) the language of the Master to the effect that interest on investment in tangibles should not be allowed because the Court of Appeals had theretofore directed "that the profits be awarded to Larson" and did not "authorize any deduction to be made therefrom."

The unsoundness of the Master's conclusion was shown by the District Court and by the Court of Appeals, and it is further shown by numerous authorities which hold that an infringing defendant who is ordered to account for profits and who is doing both an infringing and non-infringing business is entitled to deduct interest on capital invested in proportion to the ratio that the infringing business bears to the whole business, regardless of whether the infringement be wanton or not.* Petitioner has cited no contrary authority.

**Standard Scale & Supply Co.* v. *Cropp Concrete Mach. Co.*, 6 Fed. (2d) 447 (7 C. C. A. 1925).

Western Glass Co. v. *Schmertz Wire Glass Co.*, 226 Fed. 730 (7 C. C. A.).

Computing Scale Co. v. *Toledo Computing Scale Co.*, 279 Fed. 648 (7 C. C. A.).

Oehring v. *Fox Typewriter Co.*, 251 Fed. 584 (2 C. C. A., 1918).

Philadelphia Rubber Works v. *U. S. Rubber Reclaiming Works*, 276 Fed. 600, 608, affirmed 277 Fed. 171 (2 C. C. A.).

Lee v. *Malleable Iron Works*, 247 Fed. 795 (D. C. Wis. Geiger, J.)

Christensen v. *National Brake & Electric Co.*, 10 Fed. (2d) 856 (D. C. Wis., Geiger, J.).

See also:

Manufacturing Co. v. *Cowing*, 105 U. S. 253, and *Seabury* v. *Am. Ende*, 152 U. S. 561, discussed at length in *Western Glass Co.* v. *Schwertz Wire Glass Co.*, 226 Fed. 730, at p. 739, 40.

Central Coal & Coke Co. v. *Hartman*, 111 Fed. 96, 99, 102 (8 C. C. A.).

With respect to the allowance of the item of interest on capital invested in patents, petitioner claims that such investment was never made. (br. p. 45.) This is another misstatement. Respondent furnished full and abundant evidence which showed to the complete satisfaction of both courts below that its investment in patents and patent rights amounted to $1,500,000.

The District Court, in speaking of interest on tangible investments, said (VII, 3389):

> "The evidence returned by the Master furnishes a sufficient basis upon which to determine that part of the capital of Wrigley Company which consisted of tangible assets employed in the manufacture and marketing of Doublemint. This clearly appears from an examination of the testimony and an inspection of the exhibits returned with the report. * * * There is no material conflict in the evidence."

And, in speaking of the allowance of interest on investments in patents, the District Court said (R. VII, p. 3390) that:

> "The evidence as to the proper deduction from gross profits on this account is clear and involves no material conflict."

The Court of Appeals referred to the evidence and said with respect to interest on invested capital (XI, 4757):

> "No valid reason appears to us why the amounts which the court fixed are not proper."

IX.

Interest on an Award of Profits in an Unfair Competition Case Cannot Begin to Run Until the Amount of Profits Has Been "Judically Ascertained," and a Wanton Infringer Is No More Chargeable with Interest on Profits Before They Are So Ascertained Than an Innocent Infringer.

Both upon principle and authority interest on an award of profits in an unfair competition suit cannot begin to run prior to their "judicial ascertainment," and a wanton infringer found guilty in such a suit and ordered only to account for profits is no more chargeable with interest on the profits before they are judicially ascertained than is an innocent infringer. In considering patent infringement cases it must be remembered that the relief is based upon the statute which allows both damages and profits. Moreover the statute allows only the actual damages and not the profits to be increased. The correct rule is that recognized in *Standard Scale & Supply Co.* v. *Cropp Concrete Machinery Co.,* 6 Fed. (2nd) 447, 449 (7 C. C. A.), which is that nothing which is in the nature of damages can be allowed a plaintiff in an infringement suit where, as here, the accounting decree is not for damages, but for profits only. There is no statute allowing profits, must less interest thereon, in an unfair competition case, and profits cannot, in any event, be increased in such a case by adding interest prior to their determination because such increase would necessarily be in the nature of damages. It is not money received by the Wrigley Company and if it were it would not be money received from the sale of Doublemint; it is no part

of actual profits received by Wrigley but at the most potential profits only and such profits are not recoverable. (*Root* v. *Ry. Co.* 105 U. S. 189, 197; *Computing Scale case,* 279 Fed. 648, 679, 7 C. C. A. 1921.)

In the instant case the Larson Company admits it is "not now seeking other than profits," and the Court of Appeals held in its second opinion herein that the Larson Company has expressly waived damages. And interest prior to judicial ascertainment in this case is and can be nothing more nor less than damages and not profits.

In *U. S.* v. *North Carolina,* 136 U. S. 211, 216, the court said:

> "Interest, when not stipulated for by contract, or authorized by statute, is allowed by the courts as damages for the detention of money or of property, or of compensation, to which the plaintiff is entitled."

To the same effect, *Young* v. *Godbe,* 15 Wall. 562. In patent suits this court has frequently announced the general rule that the plaintiff is not entitled to recover interest on the profits of an infringing defendant until the same have been liquidated.*

As the quantum of the "profits" made by the defendant and for which it must account are not affected in any respect by its willfulness it must be plain that the date from which interest will begin to run is the same in the case of a willful infringement as in the case of an innocent infringement.

In *Winchester Repeating Arms Co.* v. *American*

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* *Mowry* v. *Whitney,* 14 Wall. 620, 653; *Littlefield* v. *Perry,* 21 Wall. 205, 229; *Parks* v. *Booth,* 102 U. S. 96, 106; *Illinois Central R. R. Co.* v. *Turrill,* 110 U. S. 301; *Tilghman* v. *Proctor,* 125 U. S. 136; *Western Glass Co.* v. *Schmertz Wire Glass Co.,* 226 Fed. 730 (7 C. C. A.).

Buckle & Cartridge Co. 62 Fed. 278 (C. C. Conn.), there was an award of profits in a patent infringement case. Judge Shipman, citing *Tilghman* v. *Proctor,* 125 U. S. 136, allowed interest from the date of the master's report only and refused to go into the question of wilfulness. The court said:

> "As the questions relate exclusively to profits and not to damages, I have not examined the subject of the willfulness of the defendant's infringement."

In *Brennan* v. *Dowagiac Mfg. Co.* 162 Fed. 472 (6 C. C. A., Judge, later Mr. Justice Lurton sitting), a patent suit, notwithstanding the fact that defendant was a willful infringer, plaintiff was allowed to recover interest on the defendant's profits (474) only "from the date of filing the Master's report."

In *McCourt* v. *Singers-Bigger,* 145 Fed. 103 (8 C. C. A.), the court refused to charge defendant, who was guilty of deliberate fraud and was accounting for profits, with interest thereon prior to liquidation.

In *Goodrich* v. *Consolidated Rubber Tire Co.,* 251 Fed. 617, 618 (7th C. C. A.), cited by petitioner (br. p. 18, 47), the court announced without qualification that interest on profits is not recoverable "until judicial ascertainment" although there was much evidence in the case to indicate wantonness. The court in that case awarded plaintiff damages and not defendant's profits, and for that reason allowed interest from the end of the accounting period.

It is noticeable that counsel for petitioner has not referred to a single case where a plaintiff in a patent infringement suit was allowed to recover interest on the defendant's "profits" before the date of the filing of the master's report.

In *Tilghman* v. *Proctor,* 125 U. S. 136, 160 (cited by petitioner, Br. pp. 18, 47), a patent suit, the court in refusing to allow interest on profits before the date of the Master's report, pointed out that unliquidated damages do not, as a general rule and in the absence of special circumstances, bear interest until after their amount has been judicially ascertained; and the court called especial attention to the fact that "at the time of the infringement the fundamental questions of the validity and extent of Tilghman's patent were in earnest controversy and of uncertain issue."

So, in the present case, during the whole accounting period the question of Larson's title and infringement was certainly "in earnest controversy"; and, moreover, Judge Anderson had held that the Wrigley Company was not an infringer and his decision stood until reversed by the Court of Appeals a few months before the close of the accounting period.

Certainly the sales of Doublemint made by the Wrigley Company since Judge Anderson dismissed the counterclaim on March 14, 1917 and up to the end of the accounting period, November 12, 1918, were with at least the implied approval of the judge who dismissed the counterclaim for want of equity (*Vrooman* v. *Penhollow,* 222 Fed. 894, (6 C. C. A.); and under those circumstances "it would be straining the doctrine of inferred intent beyond all reasonable bounds to hold" that the Wrigley Company "intended to enter into 'an unlawful competition' with complainant". *Dr. A. Reed Cushion Shoe Co.* v. *Frew,* 158 Fed. 552 (C. C. N. Y.); *Fairbank* v. *Windsor,* 124 Fed. 200 (2 C. C. A.)

In *Mowry* v. *Whitney,* 14 Wall. 620, 653, (cited by

petitioner pp. 18, 47), this court even refused to allow interest on profits "before the final decree." Although this court there said, "we will not say that in no possible case can interest be allowed," such language is no justification for saying that it will be allowed on *profits* where a defendant is wilfull or malicious, or that it will be allowed before the date of the Master's report and where, as here, damages are waived. Of course, in a case of "damages" as distinguished from "profits" the plaintiff may in some instances recover interest thereon.

Malleable Iron Range Co. v. *Lee,* 263 Fed. 896, 902, (relied on by petitioner, br. pp. 18, 47), was like *Goodrich* v. *Consolidated Rubber Co., supra,* a patent case in which the award in the Circuit Court of Appeals was for *damages,* and not *profits.*

Littlefield v. *Perry,* 21 Wall. 205, 230, cited by petitioner (br., pp. 18, 47), this court, while speaking in a patent case, merely held that cases might arise where, "in order to give complete indemnity for losses sustained by wilful infringements," interest might be allowed. In other words, interest might be allowed on "damages." In the present case interest on the amount lost by the Larson Company was waived when it waived damages and asked only for "profits". Moreover, here the Court of Appeals was abundantly justified when it said that interest is not necessary to give petitioner "complete indemnity."

Consolidated Rubber Tire Co. v. *Diamond Rubber Co.* 226 Fed. 455 (N. Y. D. C.) cited by petitioner (br. pp. 18, 47) was another patent case and involved *damages* and not *profits.* The court held, as it was bound to hold under the statute, that as the infringement was deliberate and the case was in equity, in-

terest on the damages was more or less in the discretion of the court.

In *National Folding Box & Paper Co.* v. *Dayton Paper Novelty Co.,* 97 Fed. 331, cited by petitioner (br. pp. 19, 47) another patent suit, the court in refusing to allow interest before the date of the Master's report, said that "an examination of all the cases in the Supreme Court shows the greatest reluctance on the part of that court to allow interest in a patent case before the Master has liquidated the damages," and that the intimations that there might be circumstances justifying the allowance before the date of the Master's report are "vague."

In *Spalding* v. *Mason,* 161 U. S. 375 (cited by petitioner, br. p. 18, 47) the court merely held that where one contracted to pay money on a certain day he should be compelled to pay "the established rate of interest as damages for his non performance."

Here respondent never *contracted* to pay petitioner anything, and if it is liable at all, it could not know what that amount was until the question of liability was determined and the accounting was concluded. Even now the amount of profits is not yet known.

Armstrong v. *Belding Bros. & Co.,* 297 Fed. 728 (2nd C. C. A.), referred to by petitioner (br. pp. 18, 47) was also a patent case, and the decree, as it appears (178 Fed. 554) from the case below, was "to take an accounting of profits and *damages.*"

The petitioner also (br. p. 18) says,—without the citation of any authorities so holding,—"that interest is the fruit of the tree, and is always a proper recompense for withholding profits by a self-appointed agent, agent *de son tort,* a constructive trustee," etc. It is scarcely necessary to repeat that this

court, although characterizing an infringer as a trustee *ex maleficio,* has always declined to charge him with interest at least until the profits have been liquidated, and the court has always refused to treat the infringer as it would a trustee created by an express agreement, who has diverted the funds of the trust to his unlawful purposes.

In *Root* v. *Railway Co.,* 105 U. S. 189, *supra,* the court, while speaking of a patent infringer, said it "would be a *reductio ad absurdum*" to hold "that there is a fiduciary relation created between him and the wrongdoer by the fact of infringement."

In considering the question of interest the court should also bear in mind that the five-year additional period, for which petitioner is seeking interest, covers the time that the case was before the Master, and that the responsibility for the time consumed there was petitioner's and not respondent's.

Petitioner opened the proceedings before the Master on October 16, 1918, but did not rest its case until June 8, 1922 (R. III, 1595-6), which was so short a time before the summer vacation that respondent's defense could not well be started until the opening of court in the fall of that year. On September 25, 1922, which was shortly after the summer vacation, respondent promptly proceeded with its defense (R. IV, 1597) and concluded its case the following spring. Nor can it be claimed that respondent's examination of Larson caused the delay. His examination was begun on April 17, 1919 (R. II, 857), and was practically concluded in the following month, May 29, 1919 (R. II, 1087). When Larson was next called as a witness, January 7, 1920 (R. III, 1119), petitioner's counsel protested his further examination and on

January 9, 1920 (R. III, 1142), Larson refused to further testify. There was, of course, nothing to prevent petitioner from proceeding with the introduction of its evidence while the case was pending in the Court of Appeals in the mandamus proceeding until it was decided by that court on March 31, 1921. If, therefore, it is within the discretion of an equity court to grant or withhold interest on profits, it certainly ought not to be allowed where, as here, the long delay has been caused by the party seeking the interest.

Petitioner also criticizes (br. 11, 18, 24) the Court of Appeals for allowing interest on the award at the rate of only 5 per cent, while it allowed interest on capital invested at the rate of 6 per cent. This contention overlooks the uncontradicted evidence of dealers in securities and the admissions of petitioner's own witnesses that "the value" of money during the accounting period was more than 7 per cent. (V, 2225-31; X, 4266-7.) See also opinion of the District Court. (VII, p. 3390.)

Petitioner also overlooks the fact that interest on invested capital is allowed "as the value of the use of the defendant's manufacturing plant and selling facilities." (*Standard Scale & Supply Co.* v. *Cropp Concrete Machinery Co.* 6 Fed. 2nd 447; 7 C. C. A.), and is therefore properly measured by the current rate, while on the other hand when interest is allowed on an award for profits it is merely allowed as damages for the detention of the profits from the time they are liquidated by judicial determination, and therefore should not in any event be at a higher rate than is allowed upon judgments and decrees, which in

Illinois is 5%. Indeed, petitioner's counsel, Mr. Aldrich, himself asked the Master to instruct the accountants appointed by him that the Larson Company was entitled to interest on profits "at the rate of five per cent." (R. Vol. III, 1162.)

We submit that what Judge Wilkerson said when refusing to allow interest on the award before the date of the Master's Report (R. VII, 3396) was well reasoned and logical, and, regardless of the proprieties, does not justify petitioner's characterization (br. 18) that it was an "excuse," or "fanciful,—not to say childish."

The Court of Appeals did not so regard Judge Wilkerson's opinion, and in affirming it, added:

> "The award here in issue is so palpably and unquestionably ample to fully compensate Larson for any and all invasion of its rights as to suggest no circumstances which invoked the court's discretion to enlarge it by allowance of interest back of the date of the Master's report, a condition which, in our judgment, likewise forbids an interest rate above five per cent."

X.

The Court of Appeals Properly Held That Respondent Was Not Liable for the Profits Made and Received by the Separate, Independent Canadian Corporation Which Was Admittedly Organized in Good Faith, and Is Not Even a Party to the Suit.

Petitioner is here attempting to recover from the Wrigley Company, a West Virginia corporation, the only defendant to the counterclaim, profits made and received by Wm. Wrigley, Jr. Company, Ltd., a sep-

arate and distinct Canadian corporation, not a party, which was organized in January, 1916, and in the same month bought respondent's Canadian business and plant.*

It cannot be disputed that the purchase of the Canadian assets was a bona fide purchase, and that the Canadian corporation has continuously since its incorporation operated as a wholly separate and distinct entity and entirely independently of the petitioner, the West Virginia corporation.

It stands admitted of record that the Wrigley West Virginia corporation has fully accounted for all sales everywhere made by it, including those made by it in Canada and Australia, before the organization of the foreign corporations. (R. II, 755).

The record also shows that the respondent, the West Virginia corporation, has not sold any gum in Canada since January, 1916, the date of the incorporation of the Canadian Company. (R. II, 755, 763).

The uncontradicted evidence shows, and both the Master, trial court and Court of Appeals have found that the Canadian corporation was organized in good faith, and that the West Virginia corporation sold this business in good faith. In fact petitioner's counsel admitted before the master, and admits here, that there was no evidence of "any sinister purpose" in the "division of the business and transferring of the Canadian part to the Canadian company and the Australian part to the Australian company" (R. III,

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* Petitioner also claimed the profits of an Australian corporation, but, in the proceedings before the District Court on exceptions to the Master's report, waived any accounting as to the business of that corporation. (R. VI, 2754.)

1159; petition pp. 22, 26).* The Master found, and the petitioner took no exception thereto, that "the business of these foreign corporations (Canadian and Australian corporations) was carried on separately," (R. VII, 3234)

The finding of the Master that respondent must account for the business done by the Canadian and Australian corporations was, as stated by the Master and conceded by counsel for the petitioner, "not based upon any disputed question of fact, but was merely a conclusion of law based on undisputed evidence" (R. III, 1260, 1261).

An examination of the list of stockholders and directors of the West Virginia corporation, and of the Canadian corporation discloses that the West Virginia corporation has nine directors (R. X, 4097) of whom only two are directors (a minority) of the Canadian Company which has five directors (R. X, 4097); that the West Virginia Company has 83 stockholders, of whom 40 (almost half) hold no stock at all in the Canadian Company (R. X, 4095-7); that these 40 stockholders own over 8000 shares of common stock, and over 6400 shares of preferred stock of the West Virginia corporation; that there are 8 stockholders in the Canadian Company who own nearly one-eighth of its common stock but own no stock at all in the West Virginia corporation; that the majority of the directors of the Canadian Company own over 11 per cent of the stock in that company, but own less than 1 per cent of the stock in the West Virginia Company, and that the directors so

* The organization of the Canadian corporation was wholly uninfluenced by this litigation, and was due to agitation in Canada during the war in favor of home industries. (R. II, 748-9.)

composing said majority of the board of the Canadian Company are not officers or directors of the West Virginia corporation (R. X, 4095-7). It also appears that with the exception of preferred stock, which has no voting power unless there be a default in the payment of dividends thereon (R. X, 4085), the West Virginia Company has never held any common stock in the Canadian Company as that stock was, at the time of the sale to the Canadian Company of the Canadian assets, immediately distributed among the West Virginia Company's then stockholders (R. II, 575-6; X, 4073).

The uncontradicted evidence further specifically shows (R. II, 830-4; 748-9; 601; 760-2) that the Canadian Company was managed independently of the West Virginia Company, dealing with the West Virginia Company only in the purchase of a few items, and for these payments were made; that the Canadian Company was at liberty to and in fact did purchase wherever it pleased; that it owned its own property, offices and factory; had its own debtors and creditors; kept its own separate books and bank accounts; employed and discharged its own employes; made its own contracts and leases; paid all its own bills; collected its own accounts; manufactured and sold what it wished and at prices fixed by it, though its own independent salesmen, and selling organizations; did its own advertising, and transacted all its business under its own name; that the West Virginia Company kept accounts with the Canadian Company only in the same manner that it did with other persons with whom it was doing business, and that the business of the Canadian Corporation was at no time owned, controlled, or directed by

the West Virginia corporation.* While the relations were friendly, the uncontradicted evidence conclusively shows that the Canadian corporation was in no way an instrumentality, department, branch, agency, or adjunct of the West Virginia corporation.

Under the circumstances here shown the West Virginia Company was not responsible infringing acts, if any, committed by the Canadian Company after the transfer.

The authorities are without conflict to the effect that a good-faith transfer *pendente lite* of a business and its assets do not make the grantor liable for profits resulting from the grantee's infringements subsequent to the transfer.†

Moreover in the instant case the Master was directed to take an account of "Wrigley Company's" profits accruing to "it", and the decree submits no other matter for his report.

The law is also well settled that where an accounting of profits is sought in equity the defendant is

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* The assertion of petitioner (Pet. pp. 10, 17, 26; Br. pp. 13, 20) that the West Virginia Company controlled the Canadian Company and continued to own and control the properties in Canada after January, 1916, is absolutely without any basis in this record.

† *Herman* v. *Youngstown Car Mfg. Co.*, 216 Fed. 604 (6th C. C. A.—See in connection therewith *Herman* v. *Youngstown Car Manufacturing Co.*, 232 Fed. 361 (6 C. C. A.), showing how subsequently a supplemental bill was filed against the purchaser *pendente lite* for profits made by it after the infringement.)

Prest-O-Lite v. *Bounronville*, 260 Fed. 446 (D. C. N. J. in connection therewith see *Prest-O-Lite Co.* v. *Acetylene Welding Co* 259 Fed. 940).

Davey Tree Expert Co. v. *Frost & Bartlett Co.*, 300 Fed. 680 (D. C. Conn. 1924).

only liable for the profits which have actually accrued to himself, and not for any profits which may have accrued to other persons joining in the tort.*

The only case cited by petitioner in this connection having reference to a purchase *pendente lite,* (br. 312, 315) is *Merriam* v. *Saalfield,* 190 Fed. 927 (6 C. C. A.) (on rehearing 198 Fed. 369). All that case decides is that where an independent suit is instituted against the purchaser *pendente lite,* such purchaser is bound by the decree entered against his vendor subsequent to the purchase. That case might have some bearing in a suit against the Canadian Company, or if it were a party to this suit. No attempt was made in *Merriam* v. *Saalfield,* as in the case at bar, to hold the vendor for profits made or for acts committed by the vendee, and that, too, after the sale, and no such question was involved, or even alluded to by the Court. Moreover, the *Merriam* case was decided in 1911 by the same court that a few years later (1914) squarely decided, in *Herman* v. *Youngstown Car Mfg. Co.,* 216 Fed. 604, *supra,* (Judge Knappen sitting in both cases), that a vendor, who was sued for patent infringement, could not be held for profits made by its good faith purchaser, *pendente lite.*

Counsel for petitioner also refers to 17 R. C. L. 1031-1033. The substance of that citation is that the purchaser *pendente lite* takes subject to the court's

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* *Elizabeth* v. *Pavement Co.,* 97 U. S. 126 (1887); *Belknap* v. *Schild,* 161 U. S. 10; *Coupe* v. *Royer,* 155 U. S. 565; *McSherry Mfg. Co. et al.* v. *Dowagiac Mfg. Co.,* 160 Fed. 948 (6th C. C. A., 1908, opinion by Judge Lurton); *International Radio Telegraph Co.* v. *Atlantic Communication Co.,* 290 Fed. 698 (2nd C. C. A. certiorari denied 263 U. S. 705); *Dangler* v. *Imperial Machine Co.,* 11 Fed. (2nd) 945 (7th C. C. A.).

subsequent adjudication concerning "the property which is the subject matter of the litigation," and that where the subject matter is land the purchaser *pendente lite* is subject to dispossessory writs which may be issued on the judgment in the suit. Such doctrine is manifestly no support for counsel's contention in this case that the grantor is liable for profits resulting from the acts of its grantee subsequent to the conveyance where, as here the conveyance is in good faith and the grantee is not an adjunct or agency of the grantor. The profit, if any, which the Canadian Company may have earned in the conduct of its business after it purchased the Canadian plant was not "the property which is the subject matter of the litigation" here; but that profit resulted from the Canadian Company's conduct and the operation of its own business.

The doctrine of *lis pendens* has no application to anything here involved, but would be applicable, if at all, only against the Canadian corporation, and that company can be held accountable for profits earned by it only in litigation to which it is a party. If any injury has been done petitioner by the Canadian corporation it was only because of some wrongful act committed by it after it acquired the Canadian business, and the Canadian Company alone can be liable for the profits made by it.

The fact that the two companies have some stockholders and directors in common, would not make respondent liable for profits, if any, accruing to the Canadian Company for its own infringements.

In equity, as well as at law, the distinct entity of two corporations will not be disregarded unless one corporation is so organized and controlled and its

affairs are so conducted as to make it merely an agent, or adjunct of the other corporation; and the mere fact that the two corporations may have the same or many stockholders in common, or that all of the capital stock of the one corporation may be owned by the second corporation, or that the second corporation has the power to control the affairs of the first, is insufficient to induce a court to treat the two as one.

The leading case of *Pullman* v. *Missouri Pacific Co.* 115 U. S. 587, is decisive of this question.*

Linn & Lane Timber Co. v. *U. S.,* 196 Fed. 593 (9 C. C. A.) affirmed by this court in 236 U. S. 534, and *McCaskill & Co.* v. *U. S.* 216 U. S. 504, are the only cases other than *Merriam* v. *Saalfield,* 190 Fed. 927, *supra,* cited by petitioner to support its *lis pendens* doctrine. Those were cases where the United States Government filed bills to annul patents or deeds to public lands which had been fraudulently procured from the Government and then transferred to corporations that were organized by the guilty parties merely as dummies and in order to cover up the fraud.

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* *Pittsburgh & Boston Co.* v. *Duncan* 232 Fed. 584 (6th C. C. A. 1916, opinion by then Judge now Mr. Justice Sanford); *Richmond Const. Co.* v. *Richmond Railroad Co.,* 68 Fed. 105 (6th C. C. A. opinion by then Judge, afterward Mr. Justice Lurton, in which the present Chief Justice and Judge Severens also sat).

In re Watertown Paper Co., 169 Fed. 252 (2 C. C. A. 1909)

Martin v. *Development Co. of America,* 240 Fed. 42 (9 C. C. A. 1917)

Peckett v. *Wood,* 234 Fed. 833 (3 C. C. A. 1916)

Walker v. *Gulf, etc. Ry. Co. of Texas,* 269 Fed. 885 (5 C. C. A. 1921)

Peterson v. *C. R. I. & Pac. Ry. Co.,* 205 U. S. 364

City of Holland v. *Holland Gas Co.,* 257 Fed. 679 (6th C. C. A.)

At page 22 of its brief, petitioner has written a supposed syllabus in criticism of the opinions below, entitled "Infringement made Easy". That the reflection on the courts below contained in the criticism is unwarranted is at once apparent when the opinions of the courts below are read. The courts did not allow the Wrigley Company to escape the result of its own alleged infringement; both the courts decreed that respondent should pay for every package of gum which it had sold in the alleged infringing dress during the accounting period, but they did not do the injustice of making it pay profits received by an independent entity, (organized in good faith) as a result of an alleged infringement by that independent entity. Moreover, in the supposed syllabus petitioner has not even correctly presented the facts with respect to the corporate organizations. The officers of the West Virginia corporation do not (as stated by petitioner) constitute a majority of the Board of Directors of the Canadian corporation, but only two of the five Directors of the Canadian corporation are directors of the West Virginia Corporation; only one of these directors is an officer (as distinguished from director) in both corporations, and he is the only officer (as distinguished from director) common to both companies.

Petitioner also erroneously claims that on the second appeal and mandamus proceedings, the Court of Appeals adjudicated that the West Virginia Company (respondent) was liable for the profits made by the Canadian corporation. The fact is that the Court of Appeals never passed upon that question until the last appeal.

There can be no pretense that the question of holding the Wrigley Company liable for profits made by the Canadian Company was involved in the first appeal, or was decided or even alluded to by the Court of Appeals in its first opinion. With respect to the second appeal, an examination of the record discloses that no such question was in issue, nor was it decided or even alluded to by the Court of Appeals. The only question then decided was that the West Virginia Company must file an account of all of its own sales, regardless of the territory where made.

The second appeal arose out of the refusal of L. P. Larson, Jr., president of petitioner, to disclose in the proceedings before the Master the extent of the Larson Company's business at a time when the Wrigley Company was contending before the Master that it should not be compelled to account for business done (a), in places where petitioner did no business, or (b), by foreign corporations which were not its agents or adjuncts. Of course no inquiry was made of Mr. Larson respecting the business of the foreign corporations.

When the case was taken to the Court of Appeals upon Mr. Larson's refusal to further answer as to the extent of his corporation's business the Wrigley Company had not yet closed its case with respect to the foreign corporations and the question as to whether the Wrigley Company could or should be directed to account for the profits of the foreign corporations which it claimed were independent entities, had not even been passed upon by either the Master, or by the District Court. Manifestly the Court of Appeals could never have been called upon

to determine that question except as a reviewing court and after the matter had been first heard and decided by the Master and then by the District Court.

When the case again came before the Master after the second appeal and mandamus he refused to order the Wrigley Company to account for sales made by these foreign companies until the Wrigley Company had closed its proofs respecting the relations between it and the foreign companies. This led to another motion by petitioner in the Court of Appeals for an order expressly directing the Master to order the Wrigley Company to file an account of the profits of the foreign companies. That motion, which was based on the second opinion of the Court of Appeals was denied. (R. VII, 3201).

Petitioner without the slightest justification also asserts (br., p. 23) that respondent itself "repeatedly stated" and took the position in its petition for rehearing filed when that court rendered its second opinion that the Court of Appeals had decided in its second opinion that respondent must account for the profits of the Canadian corporation. Petitioner bases its assertion upon excerpts from respondent's petition for rehearing appearing in Exhibit D attached to the petition (p. 59). A reading of those excerpts will immediately disclose petitioner's misinterpretation thereof, as they clearly show that respondent was only protesting against any decision by the Circuit Court of Appeals that it must account for profits resulting from its own sales in non-competitive territory. Not a word will be found therein to indicate that petitioner was claiming (and it never claimed) that the decision of the court ren-

dered it liable for profits accruing from sales made by the Canadian corporation.*

Conclusive evidence that the Court of Appeals, in its second decision, did not hold that the Wrigley Company must account for the profits of the foreign corporations is, of course, found in its last opinion in this case, in which the Court treated its second decision which was at most interlocutory as leaving the question open. (*Simmons* v. *Grier* 258 U. S. 82).

Petitioner also cites a number of cases (br., pp. 20, 21) to the effect that the Wrigley Company waived any right on the part of the master to make separate reports on the Canadian matter, or to question his power to investigate that matter.

If it were necessary, we could easily demonstrate from the record that the Wrigley Company was at all times protesting against the power of the master to compel it to file an account of the business of the Canadian company, and never waived its objection to the right of the master to make separate reports. (R. III 1260; IV, 1884; VI, 2898) We could also show, by reference to authorities, that the respondent properly challenged the master's treatment of the whole Canadian question by exception to the master's report. However, both parties expressly agreed (R. VI,

* This makes it entirely unnecessary to discuss the cases referred to on page 23 of petitioner's brief which lay down the general rule with respect to a party changing his position in the course of litigation; a rule moreover, which, in any event could have no application to a mere protest based on a party's interpretation of an opinion, and made in a petition for rehearing which the court denies without opinion perhaps for the very reason that it thinks the opinion does bear the construction asserted by the complaining party.

2764) before the case was disposed of by Judge Wilkerson that he might decide the right and power of the master to order an accounting of the sales of gum made by the Canadian Corporation in the alleged infringing dress. Therefore all discussion as to the right of the master to make separate reports, or whether the respondent consented thereto, or whether respondent properly raised the Canadian question by exceptions to the master's report, is obviously unnecessary.

We submit that it is clear from the facts and the authorities that both the Court of Appeals and Judge Wilkerson correctly decided that respondent need not account for the profits of the Canadian Corporation.

Conclusion.

We confidently assert that the petitioner has not shown any sufficient ground for the granting of its petition and that it should therefore be denied.

Respectfully submitted,

Isaac H. Mayer,
Wallace R. Lane,
Counsel for Respondent.

November 23, 1927.

APR 17

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1927.

No. 603

L. P. LARSON JR. COMPANY,
Petitioner.

vs.

WM. WRIGLEY JR. COMPANY,
Respondent.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR RESPONDENT.

IN ASCERTAINING THE NET PROFITS OF AN INFRINGER THE FEDERAL INCOME AND EXCESS PROFITS TAXES PAID BY HIM ARE DEDUCTIBLE LIKE ANY OTHER EXPENSE NECESSARILY INCURRED IN THE CONDUCT OF THE INFRINGING BUSINESS.

ISAAC H. MAYER,
WALLACE R. LANE,
Solicitors and of Counsel for Respondent, Wm. Wrigley Jr. Company.

CHICAGO, April 16, 1928.

GUNTHORP-WARREN PRINTING COMPANY, CHICAGO.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1927.

No. 603

L. P. LARSON JR. COMPANY,
Petitioner.

vs.

WM. WRIGLEY JR. COMPANY,
Respondent.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR RESPONDENT.

I.

Preliminary Suggestions.

This case involves no trade-mark, but only unfair competition. Petitioner waived damages and took a decree directing an accounting before a Master for profits only, resulting from the manufacture and sale of respondent's "Doublemint" gum in the enjoined dress. Respondent's business consisted not merely of the manufacture and sale of Doublemint chewing gum, but also of a large number of other brands. The entire business was conducted as a single enterprise. The accounting decree, which was prepared by petitioner, provided for making "proportionate deductions for overhead, advertising and other proper expenses." (R. I-517). Upon the ac-

counting the Master found such net profits to be $2,860,083.66. No exceptions to the report were filed by petitioner, but on exceptions filed thereto by respondent the District Court reduced that amount to $1,384,649.48 and, on appeal by both parties to said Court of Appeals, the amount was still further reduced by two additional credits the amounts of which are still undetermined by the court. (20 F. (2d) 830; R. XI, p. 4761.)

Petitioner filed a petition for rehearing which was denied by the Court of Appeals and then filed its petition herein for a writ of certiorari, although no final decree has as yet been entered in the case, asking a review of all the deductions from gross profits allowed by the courts below, and also insisting on an allowance of gross profits ($5,152,689.32); but in allowing the writ the Court directed that "the questions to be re-examined shall be limited to those relating to the deductions of Federal income and excess profits taxes from the net profits awarded to the petitioner." The amount of those taxes, to be hereafter determined by the District Court, is one of the two credits allowed by the Court of Appeals in addition to those allowed by the District Court.

Petitioner has misstated the record and the actual facts at page 8 of its petition when it said:

> "The Circuit Court of Appeals * * * allowed on this account as a credit to the Wrigley Company the sum of $888,276.52 or over $500,000 more than the Wrigley Company claimed in its filed account." *

The Court of Appeals did nothing of the sort. It did not attempt to determine the amount of the credit to be allowed respondent, but, on the contrary, the

*This same misstatement is repeated at page 12 of the brief filed by petitioner with its petition.

court expressly held "that the amount of this tax attributable to the net profit on 'Doublemint' should be ascertained under the direction of the District Court and the award to Larson reduced accordingly". (R. XI—4528). The Court of Appeals merely held that an infringer may deduct from his accountable profits Federal income and excess profits taxes paid by him, and expressly said that it was "not undertaking to lay down a hard and fast rule for fixing the amount of such tax deduction". The court also held that the maximum deduction in this case should not exceed the amount that petitioner would have had to pay if the profits had been turned over to it as and when earned.

There is no exhibit or testimony in the record to show the amount of petitioner's invested capital or its net income during the accounting period, and without that information no computation can possibly be made under the Revenue Acts as to the amount of income and excess profits taxes which petitioner would have had to pay if the profits had been turned over to it as and when earned. The fact is that respondent sought but was not allowed to make that proof. (R. VI, 2462-4; 2507-8.)

Petitioner has evidently taken the amount, $888,276.52, from an unsworn report inserted in its petition as Exhibit C at page 49 alleged to have been made to its chief counsel, Mr. Aldrich, by Touche, Niven & Co., a firm of accountants, who, petitioner incorrectly states (petition, p. 23), were "appointed by the master," but who, on the contrary, as the Court of Appeals found, were "employed by petitioner". (R. III, 1144-5, 1149.) That report is no part of the record and does not purport to have been made until April 15, 1927,

which was nearly 3½ years after the Master's Report was filed, and its accuracy is disputed by respondent.

The petition (p. 23) also says that respondent only claimed a deduction of $372,942.09 on account of these taxes, and, as we have seen, it further says that the Court of Appeals allowed "over $500,000 more than the Wrigley Company claimed in its filed account." This statement is also without any justification, and, as we shall show when we consider the amount which should be allowed, respondent never claimed any less than $551,061.35 in its filed account; and it must be borne in mind that the amount claimed in the filed accounts was based upon respondent's theory of allocating advertising and other expenses which was not fully adopted by the courts below, and consequently the amount of respondent's deduction for these taxes was based upon a very much smaller amount of profit than that found by either of the courts below.

We have been at pains to point out the foregoing misstatements by petitioner because we regard them as serious and believe that this court may possibly have already been misled thereby. We are led to this conclusion because, although the petition complained of all the credits which have been allowed respondent, yet, in allowing the writ, the Court limited the questions to be re-examined to those relating to the deduction of the Federal taxes.

We might well ignore petitioner's constantly reiterated vicious attacks upon respondent's conduct*

*Eliminating for the moment the Pulver matter, all charges of misconduct were shown by respondent to have been so

were it not for the charge made at page 4 of petitioner's brief that respondent's "attorneys" and "some of the executive officers" of respondent threatened to ruin Larson if he persisted in this litigation. That statement cites Record VII, page 3013 which shows that it is based upon an *ex parte* affidavit filed by Larson (president and principal owner of petition) in the Court of Appeals without its permission, after petitioner had there filed its petition for a writ of mandamus directed against the District Judge and after the judge had filed his return thereto. In that affidavit Larson, without referring to any person by name, merely averred that this alleged threat was made by "the Wrigley interests".

No issue was or could have been made on that affidavit, and as petitioner nowhere sought to prove its truth, (as it unquestionably would have done if the charge had not been baseless), respond-

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absolutely unwarranted and groundless that petitioner did not even file an exception to the Master's report in which no reference was made to any of them, and the District Court and Court of Appeals also totally ignored them.

The so-called Pulver matter was before the Court of Appeals on the first appeal and is the only matter which has ever subjected the respondent to any criticism in the whole course of this litigation, and after a final decree has been entered in this case we hope to have an opportunity to show this court that the Court of Appeals entirely misconceived the evidence with respect thereto, and even overlooked the fact that the Pulver settlement was made before the evidence in his case was closed, and that there was no adjudication that Pulver was the originator of respondent's color scheme, and that the Pulver decree showed on its face that it was a consent decree and respondent never placed any reliance thereon in the pending litigation, and that there has been no concealment on respondent's part, but, on the contrary, petitioner had full knowledge of all the facts and set them up in its answer in this suit.

ent never had any opportunity to disprove it. And now petitioner boldly and without the slightest justification goes still further than the affidavit and says that this alleged threat was made,—not by the unnamed "Wrigley interests", but by respondent's "attorneys" and "some of the executive officers" of respondent.

We submit that the recklessness with which petitioner has made this serious charge, not only against respondent, but also against counsel, requires, and we respectfully ask that the court strike petitioner's brief from the files as was done by the court very recently, in *M. K. T. R. R. Co.* v. *State of Texas,* ..... U. S. .....; 72 L. ed. 121, (Adv. Sh. Dec. 1, 1927) in disapproving the "insinuating and irregular method of reflecting on opposing counsel." We have inserted in a footnote* what Mr. Chief Justice White said in delivering the unanimous opinin of this court in *Supreme Council of the Royal Arcanum* v. *Green,* 237 U. S. 531, in striking a brief, as the language is equally applicable here.

The impropriety of petitioner's vicious attacks is additionally shown when we keep in mind the limited scope of the writ which this court has issued and the uniform holding of the authorities that whatever deductions are properly allowable to an innocent infringer liable for profits, are equally allowable to

*(p. 546). "The printed argument for the defendant in error is so full of vituperative, unwarranted and impertinent expressions as to opposing counsel that we feel we cannot, having due regard to the respect we entertain for the profession, permit the brief to pass unrebuked or to remain upon our files and thus preserve the evidence of the forgetfulness by one of the members of this bar of his obvious duty."

a wilful infringer. Indeed, if a defendant in an unfair competition suit be an innocent infringer, he is not liable to profits at all.†

Profits are profits, and the items that are to be included or deducted in ascertaining net profits are well known and are fixed by numerous decisions.

In the leading case of *Root* v. *Railway Co.* 105 U. S. 189, the court held that an infringer of a patent will be treated as a trustee *ex maleficio,* but only with respect to the profits actually realized from the infringement, and that a court of equity will permit infringers to make deductions for the cost and expenses of the infringing business because it is "thought more equitable to do so" and "in order to mitigate the severity of the punishment to which they might be subjected in an action at law for damages"; that there is "no rule which converts a court of equity into an instrument for the punishment of simple torts"; and that patentees will only be "allowed to claim that which, *ex aequo et bono* is theirs and nothing beyond this"; and that "the adjustment of these profits is subject to all the equitable considerations which are necessary to complete justice between the parties."

To the same effect:

Dowagiac Mfg. Co. v. *Minnesota Plow Co.* 235 U. S. 641, 647.

Tilghman v. *Proctor,* 125 U. S. 136, 145.

As was well said in *Christensen* v. *National Brake*

†*Saxlehner* v. *Siegel Cooper & Co.,* 179 U. S. 42.
McLean v. *Fleming,* 96 U. S. 245.
Fairbanks Company v. *Windsor,* 124 Fed. 200, 202 (2 C. C. A.).
Straus v. *Notaseme,* 240 U. S. 179.

and Electric Co. 10 Fed. (2d) 857, (D. C. Wis., Geiger, J.), in holding that an infringer accounting for profits should be allowed interest on invested capital, taxes and insurance:

> "There is no such thing as 'infringing' profits or losses,"

and the court added that the infringer is entitled to precisely the same credit for "disbursements" as though he had been in the exercise of a trust "lawfully created."

In *Hamilton Brown Shoe Co.* v. *Wolf Bros.*, 240 U. S. 251, *supra,* the court reaffirmed the doctrine of the *Root* case, *supra,* and allowed the cost and expenses to be deducted by a defendant who was found to have willfully and fraudulently simulated plaintiff's trade-mark and entered defendant's territory for the purpose of destroying his business.*

In *McSherry Mfg. Co.* v. *Dowagiac Mfg. Co.* 160 Fed. 948 (6. C. C. A., Judge Lurton sitting), where the defendant had willfully infringed the plaintiff's patent, the court held that in fixing *actual* damages, wantonness was irrelevant and its consideration was merely "calculated to interfere with the free play of one's mind thereon."

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* The following cases also show that a wilful or wanton infringer when accounting for profits is entitled to the same deductions as an innocent infringer.

Walter Baker & Co. v. *Slack*, 130 Fed. 514 (7 C. C. A.).
Lee v. *Malleable Iron Co.* 247 Fed. 795 (D. C. Wis. Geiger, J.).
A. Mecky Co. v. *Garton Toy Co.*, 277 Fed. 507 (D. C. Wis. Geiger, J.).
Gordon v. *Turco-Halvah Co.* 247 Fed. 487 (2 C. C. A.).
Winchester Repeating Arms Co. v. *American Buckle Co.*, 62 Fed. 278 (C. C. Conn.).

Indeed, petitioner has expressly and repeatedly recognized and admitted the right of respondent to deduct all expenses, and is now estopped from asserting the contrary. Petitioner, itself, prepared and took a decree which directed the Master's accountants to make "proportionate deductions for overhead, advertising and other proper expenses" (R. VI, 2457-8). Besides, the Master allowed deductions for expenses aggregating $2,292,-605.66 (R. VII, 3230) and petitioner filed no objec-

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Decisions by District Court (5 Fed. (2) 731, 742-3) and C. C. A. in instant case (20 Fed. (2d) 832).

The cases heretofore relied on by petitioner to recover gross profits where it was held that the expenses of a wilful defendant were not deductible, were not infringement cases but were cases in which the plaintiff was seeking to recover (in whatever form it might happen to be) his own (or his debtor's) property, such as real estate, timber, etc., which had been fraudulently converted or conveyed, or the value thereof.

On the other hand, where, as here, a plaintiff in an unfair competition case asks and is allowed a recovery of defendant's profits, he neither asks for nor receives a return of any of his own property in specie, or the value thereof, but he is merely seeking compensation for the injury done to him by the use of trade insignia.

These profits result entirely from respondent's labor and the use of its own property. The most that peitioner can claim is that respondent used, in an unfair manner, a color scheme with respect to which petitioner has no monopoly, and which the entire world could use if so distinguished as to avoid confusion.

An analysis of the cases relied on by petitioner will be found between pages 10-14 of respondent's brief filed herein November 25, 1927, in opposition to the Petition for Certiorari. As we there pointed out, *Pan American Petroleum Company* v. *U. S.* 273 U. S. 456, (relied upon by petitioner, br. p. 12) was an action of rescission where the government was seeking to set aside a fraudulent transfer of its property. Moreover, the court, at pages 505 *et seq.* put its decision denying the defendant compensation on the ground that the government and not a private individual was plaintiff.

tions or exceptions to that report, so that respondent's right to make deductions for proper charges is no longer open for review.†

Finally, petitioner's chief counsel, Mr. Aldrich, admitted before the Master and the District Court that under the decree which he procured to be entered "it was the duty of the Master and the Court to allow said Wrigley Company to deduct from said gross profits its overhead, advertising and other proper expenses." (R. VI, 2755; See, also, III, 1153-8.)

II.

In Ascertaining the Net Profits of an Infringer the Federal Income and Excess Profits Taxes Paid by Him Are Deductible Like Any Other Expense Necessarily Incurred in the Conduct of the Infringing Business.

In *Galveston Electric Co.* v. *City of Galveston,* 258 U. S. 388 (a rate case), the court held that in order to ascertain net profits, Federal income and excess profits taxes should be deducted the same as any other kind of taxes, saying (399):

> "There is no difference in this respect between state and federal taxes, or between income taxes and others."*

In *Sly Mfg. Co.* v. *Pangborn Corporation,* 276

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†*Morrill* v. *Jones,* 106 U. S. 466.
Harding v. *Giddings,* 73 Fed. 335, 341 (7 C. C. A.).
Adams v. *Shirk,* 117 Fed. 801, 803 (7 C. C. A.)
New Amsterdam Casualty Co. v. *Farmers Co-op. Union,* 2 Fed. (2nd) 214, 218 (8 C. C. A.).

* To the same effect:
Georgia Railway & Power Co. v. *Railroad Commission,* 262 U. S. 625, 633 (1923).

Fed. 971 (D. C. Md., Rose, J. 1921), the special examiner refused to allow the defendant in a patent infringement suit to make any deduction on account of federal income and excess profits taxes. The District Court, in overruling the examiner, said:

> (p. 976) "I cannot help feeling that, in view of the high taxes now levied upon business profits, it would be utterly unfair to ignore them in determining the amount of the net gain which an infringing defendant should turn over to a plaintiff. If a patentee is damaged by a defendant's infringement, and proves the extent of it in dollars and cents, the defendant must reimburse him, and that without regard to whether the wrongdoer has otherwise made a loss by his actions; but where the owner of the patent seeks to charge the infringer, as a trustee, with the profit made, no arbitrary rule should require him to turn over a sum greatly exceeding any profit the law has allowed him to keep for himself. Only equity can award profits, and, in equity, equity must be done."

The case was affirmed by the Fourth Circuit Court of Appeals (284 Fed. 217), which expressly adopted Judge Rose's reasoning.

In *MacBeth-Evans Glass Co.* v. *Smith Glass Co.*, 23 Fed. (2d) 459 (3 C. C. A. Dec. 27, 1927), this precise question was again carefully considered in a patent infringement suit. After referring to *Sly Manufacturing Co.* v. *Pangborn Corporation, supra,* and also to the decision of the Seventh Circuit Court of Appeals in the instant case, the court said:

> (p. 463) "In the case at bar no claim is made for damages arising from infringing sales. The claim is for infringing profits. This means profits actually made. A book profit of a dollar is not a profit actually made when from the

dollar the government takes twenty cents as the price for the right to make any profit at all. The actual profit is what is left. An item which thus reduces an apparent profit and transforms it into an actual profit should, we think, be regarded a proper item of expense. It is a charge; and it is a very real one. Yet, because it is not at once ascertainable and therefore translatable into figures to be included in the final decree is not a good reason for disregarding it altogether. If it can ultimately be determined and reached in any practical way it should be considered."

In *Ransome Concrete Machinery Co.* v. *Moody*, 282 Fed. 29 (2nd C. C. A. 1922), the court had before it for construction a contract whereby an employee of a corporation was to receive a certain percentage of the net profits. The court set out in full and adopted the opinion of Judge Hough in the court below, in which Judge Hough held that in arriving at net profits the Excess profits tax should first be deducted.

In *Neeson* v. *Sangamon County Mining Co.* 316 Ill. 397 (1925) an action by an employee of a mining company for an accounting under a contract giving him a percentage of the "net profits," the court held that the employers could deduct as an expense income taxes paid during the period of employment. The court said that "the words 'net profits' * * * meant net gains of the company during the time of the contract," and that it is "clear" that the employers are entitled to a "credit of the amount of income tax they paid, which is necessarily an expense they must incur in the prosecution of their business," and that there is no reason for a contrary conclusion and that "the tax should be deducted for the

same reason any other necessary expense of the business is deducted,—because it is an expense necessarily incurred which cuts down the profits, or net gains of the business."*

In the case at bar the amount of the normal tax upon the amount of profits as fixed by the Court of Appeals amounted to $68,385.65.

Certainly the payment of the Federal income and excess profits taxes by respondent was either an item of expense chargeable to earnings, or it must have been a payment out of capital; but as stated in *Kaufman* v. *Bowers,* 11 Fed. (2nd) 662 (D. C. N. Y. 1926), to say

> "that payments on account of income and profits taxes are payments out of capital * * * is an entirely novel proposition. If there is income at all, such payments are properly payments out of current income, and are regarded as current items of expense chargeable against income, rather than against capital."

As was said in *Christensen* v. *National Brake & Electric Co., supra*:

> "Taxes, being the most inescapable and preferential of all disbursements because of sovereign exaction, can in no sense be other than a disbursement, money out of hand, laid (paid) by the one obligated to pay. It is in no sense a gain, a return, or an advantage *retained.* * * * When we test an infringer as one who is liable to account for profits upon the theory that he is

*To the same effect:

Swaller v. *Williamson Milling Co.* 116 Kan. 329; 226 Pac. 1001 (Kas. 1924).

Patton, etc. Syndicate v. *Etherington* (1919), 1 Ch. 306 (cited with approval by Judge Hough in *Ransome Concrete Machinery Co.* v. *Moody, supra*).

Vulcan Motor Co. v. *Hampson* (1921) 3 K. B. 597.

> a trustee *ex maleficio,* we are bound at once to look to both the debit and the credit side of trust obligation."

We submit that the Court of Appeals was clearly right in the instant case in holding that there is no reason "why federal income and excess profits taxes paid by a corporation, are not a proper item of expense to be charged against the gross profits for the year, in the ascertainment of what the net profits for such year were," and in also holding that outlays for these federal taxes are "necessary—yea compulsory," and that none are more so.*

If these taxes be not deductible, then respondent will be liable not only for all of the profits, which is all that petitioner seeks, but additionally for the amount of the taxes paid, and petitioner will be receiving that much more than respondent's profits.

We submit, both on principle and the authorities, *supra,* that the federal taxes in question are deductible in ascertaining respondent's net profits. Petitioner has not undertaken to criticize any of the authorities, *supra,* and the only decision which counsel for petitioner have been able to find which holds that these taxes are not deductible, is that of District Judge Dickinson in Pennsylvania in *Ellett* v. *Kline,* 22 Fed. (2nd) 807. That case was decided November 10, 1927. Not a single decision was cited by the court to support its conclusion. The court apparently was not aware of the *Sly Manufacturing Co.* case, *supra,* which was decided by Judge Rose in 1921 (276 Fed. 971), and affirmed by the Fourth Circuit Court of Appeals (284 Fed. 217), on the 21st day of October, 1922 (certiorari denied on the 15th day of January, 1923, 260

U. S. 749), or of the decision by the Seventh Circuit Court of Appeals in the instant case (20 F. 2d 830) April 2, 1927. Moreover Judge Dickinson's decision is not now the law even in his own district inasmuch as the Circuit Court of Appeals for the Third Circuit has now held, as we have shown, in the *Macbeth-Evans Glass Co.* case *supra,* that federal income and excess profits taxes are deductible from an infringer's accountable net profits.

Petitioner's Contentions.

Petitioner urges that respondent should not have credit for the amounts expended for Federal taxes on the theory that respondent can either procure a refund from the government, or that it will, in the year in which it pays or recognizes a decree in this case, be entitled to credit for the amount of the decree against its Federal "taxes" for that year.

Petitioner shows a complete misunderstanding of the Revenue law, inasmuch as it is well settled that a contingent liability of an infringer not finally determined, as in the case at bar, in 1917 or 1918, cannot, when finally determined in a subsequent year, be availed of by the taxpayer as a basis for a refund, or credit, or for any purpose whatsoever excepting only for the purpose of deducting the amount of the final judgment from the "gross income" of the

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*Petitioner's expert accountant (Steven, R. III, 1515) testified:

> "In ascertaining the profits of a concern, I would deduct the amounts paid out for income and excess profits taxes."

To like effect, see testimony of petitioner's other expert accountant, Whitworth, a member of Touche, Niven & Co., Touche Exh. 7; R. III, 1311-12.

taxpayer in the year when such judgment is acquiesced in, or paid. The deduction is allowed, not, as claimed at times by petitioner, from the "taxes", but from the taxpayer's "gross income". There is a vast difference between being merely permitted to deduct the amount of a judgment from "gross income" and being permitted to make the deduction from the "taxes".

In *Malleable Iron Range Co.* v. *U. S.*, 62 C. Cls. 425 (certiorari allowed, 273 U. S. 688, and remanded to the Court of Claims for further findings, 273 U. S. 674) the question now under consideration was passed on under a state of facts parallel to those existing here. Petitioner cites this case (br. 14) but does not fully disclose what the court there held. One would never suspect from petitioner's statement of the case that it clearly shows that respondent could not enforce a claim for refund, or recover from the government the amount of the taxes paid, or otherwise protect itself, and that the taxpayer's recourse in such a case is merely to deduct the amount of the judgment from his "gross income".

In that case the District Court entered a decree in January, 1918, against the infringer which was appealed to the Circuit Court of Appeals where a final and larger judgment was entered in 1920.

The infringer deducted the amount of the decree of the District Court from its 1918 return and an additional amount from its 1919 return to provide for a possible increase in the final judgment and for interest which had accrued. Both deductions were disallowed by the Commissioner of Internal Revenue, and by reason thereof an additional tax was assessed and paid for each of those two years. In ap-

proving the disallowance by the Commissioner of the infringer's claim for refund (which had been filed within the time allowed therefor by statute) of the taxes (which had been paid under protest), the court held that the judgment, as modified and affirmed by the Court of Appeals, "could not be deducted except for the year 1920 when it was ascertained and determined"; that "when the amount in question is in litigation, it cannot be determined until the litigation is ended," and that "the liability was contingent upon the action of the higher court," and "until that action was taken there was no fixed liability which could be deducted" from the infringer's gross income.*

Section 284 of the Act of 1926 and Articles 1304, 1305 and 1306 of Regulations 69, relied on by petitioner on page 11 of its brief, merely provide the time when, and the method by which claims for refund may be presented to the Government on account of overpayment of taxes, and the remaining Article, viz: 112 of Regulations 69, provides that where there is a judgment for damages for patent infringement, a deduction may be taken from "gross income" in computing net income subject to taxes in the year in which such judgment is either acquiesced in, or paid.

The only advantage that respondent can get when it pays or acquiesces in a final judgment herein will

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*See also:

Safe Guard Check Writer Corp. v. *Commissioner*, B. T. A. March 9, 1928.

O. D. 1917 (4 C. B., p. 142).

O. D. 1141 (C. B. No. 5, July-Dec. 1921, p. 134).

Solicitor's Memorandum, Dec. 1919 C. B. 108; and petitioner's citations at pp. 13-15 of its brief.

be a possible saving of income tax for the year in which the judgment is paid of not to exceed 13½ per cent (the present rate) of the amount of the judgment, and manifestly there will be no advantage at all if respondent's other proper deductions leave it no income in such year.* Should such an advantage arise, petitioner's interest therein can be adequately safeguarded, as was done in the *Sly Manufacturing Co.* case, by a provision in the decree requiring respondent to give security to petitioner for the payment of any amount which respondent may hereafter save.

Petitioner also claims (br. p. 8-10) that the courts will not interfere with the fixing of taxes by the tax officials unless and until the taxes have first been paid by the taxpayer and all procedure provided by statute and Treasury Regulations has been first availed of by the taxpayer, and that because the statute has given the taxpayer certain remedies against the government and has made no provision with respect to the deductibility of Federal taxes in an accounting between private parties for profits, therefore the remedy against the government prescribed by the statute is exclusive and operates to preclude an infringer from deducting Federal taxes necessarily paid by him in the conduct of an infringing business, when accounting in equity to a plaintiff who has elected to take the infringer's profits.

The absurdity of such contentions is, we believe, self-evident. They entirely confuse the rights of

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* Petitioner has again gone out of the record when, at page 12 of its brief, it seeks to inject an alleged report of respondent to its stockholders referring to its 1927 business.

parties when dealing with the Government and the rights of private parties when dealing with each other. The right of respondent hereafter to deduct the amount of a final judgment herein from its gross income cannot possibly (except to the extent of giving petitioner indemnity, as already stated) affect respondent's right, as against petitioner, to credit, when accounting for net profits, for the amount of the taxes which it actually expended. The federal statutes and Treasury Regulations expressly provide what items are to be included and excluded in ascertaining gross income and taxable net income. As this court said, "these details are largely a matter of governmental policy." (*Atlantic Coast Line* v. *Daughton,* 262 U. S. 413, footnote on p. 422.) They do not at all constitute a proper criterion as to what items are deductible in an accounting for net profits in a controversy between private individuals.

All that petitioner can claim is the actual profit resulting from the infringement, neither more nor less. If, at the time of the accounting, the amount of tax, if any, which respondent might thereafter save by its payment of a judgment, were ascertainable, the situation would be a simple one because the amount of the saving could be deducted from the credit to be given respondent. However, as the amount of the saving, if any, cannot be determined until after the judgment is paid, the respondent ought not to be prejudiced thereby and the petitioner can as we have said be sufficiently protected by a suitable provision in the decree.

Petitioner also argues (br. 16, 18) that the taxes in question are not deductible on the ground that

they constitute "a privilege tax levied upon the right to do business", and that such a tax "does not enter into the cost of the infringing acts".

The difficulty with this argument is that the taxes here involved are not levied on the right to do business, and, were it otherwise, it would be entirely immaterial.

Respondent was compelled to pay these taxes whether they be deemed a tax on income, or on the right to do business. In either event, the payment thereof diminished respondent's actual profits.

Moreover, if these taxes were levied upon the right to do business, then they were of course a tax upon respondent's right to do the infringing as well as the non-infringing business, and as a tax upon the right to do the infringing business, payment of the taxes was inescapable and as necessary and as deductible in the ascertainment of the profits resulting from that business, as a tax on the real estate employed therein, or any other expense.

However, Congress in levying the taxes in question has expressly levied them upon "net income". (Act of 1916, 39 Stat. L. 756, Sec. 10, p. 765; Act of 1917, 40 Stat. L. 300, Sec. 4, 201, 1206, pp. 302, 303, 333; Act of 1918, 40 Stat. L. 1057, Sec. 230, 301, pp. 1075, 1088.) This is also true of all the income tax Acts passed subsequent to the Sixteenth Amendment. All of these acts differ from the Corporation Tax Act of 1909, which was enacted before the 16th Amendment was adopted, and, in terms, provided that corporations should "pay annually a special excise tax with respect to the carrying on or doing business by such corporation". (See

Sec. 38, p. 112, of Revenue Act of August 5, 1909, 36 Stat. L. 11)

In *Peck* v. *Lowe,* 247 U. S. 165, 174, while considering the Act of 1913, the Court held "it is an income tax laid generally on net incomes"; and that language is equally applicable to the Act in force during the accounting period.

As appears from petitioner's brief, (p. 17, 18) the three cases relied on by it, viz: *Doyle* v. *Mitchell Bros. Co.,* 247 U. S. 179; *United States* v. *Whitridge,* 231 U. S. 144, and *Anderson* v. *Forty-two Broadway Company,* 239 U. S. 69, were all decided under the 1909 Act. That Act, as was said in the last mentioned case, "is not in any proper sense an income tax law, nor intended as such, but was an excise upon the conduct of the business in a corporate capacity, the tax being measured by reference to the income in a manner provided by the law itself".

Petitioner claims that because the Act of 1909 was a tax upon the privilege of doing business, and because the 16th Amendment permitted taxes on incomes regardless of whether they resulted from the carrying on of business or from physical property itself, such as real estate or personal property, therefore the income tax laws of 1913 and since, when applied to a corporation, must still be interpreted as a tax on the right to do business.

That argument entirely ignores the express language of all Acts passed since the 16th Amendment and also the decisions of this Court holding that while the Act of 1909 "imposed an excise or privilege, and not in any sense a tax upon property, or upon income merely as income", (*United States* v.

Whitridge, 231 U. S. 144, *supra*), the tax imposed by the Act of 1913 (and all subsequent acts are similar thereto in this respect) "is an income tax" (*Peck* v. *Lowe,* 247 U. S. 165, 174, *supra*).

That the Revenue Acts passed since the constitutional amendment have not imposed taxes on the right to do business, but merely on incomes, as such, is also shown by the fact that those Acts levy taxes upon the incomes of individuals, even though the individuals be not engaged in any business at all.

Petitioner also says (br. 18) that the interlocutory decree directing the master, when taking the account, to make proper allowances for all expenses, does not apply to Federal taxes. That suggestion begs the question. Both the District Court and the Court of Appeals held that there was nothing in the decree forbidding the making of all proper deductions in ascertaining respondent's net profits. If, as we have elsewhere herein shown by numerous authorities, Federal income and excess profits taxes are, as a matter of law, deductible in determining the recoverable net profits of an infringer, then the accounting decree clearly directs rather than forbids their allowance.

Petitioner has also heretofore asserted that respondent should not be allowed to deduct the amount of Federal taxes because it "has never charged it off on its books as a loss." Respondent never claimed that the payment of the taxes was a loss any more than the payment of real estate taxes. Besides, "the decision must rest upon the actual facts" (*Doyle* v. *Mitchell,* 247 U. S. 179), and not upon book entries. (*Decker* v. *Smith,* 234 Fed. 646, 2 C. C. A.)

Petitioner also claims that respondent should be denied a deduction for these taxes because under the present law petitioner may have to pay a federal income tax of 13½ per cent on the amount of the decree, for the year in which it is paid to petitioner. Such an argument, however, is specious. The question here is simply, what were the net profits actually made by respondent. That amount cannot possibly be increased or affected by the disposition which must be made of the profits by petitioner after it receives them. If petitioner were seeking damages instead of profits, then it might become material to determine whether petitioner will be allowed to retain all the profits, or be required to give up a portion to the Government. (*Sly Mfg. Co.* v. *Pangborn*, 276 Fed. 971, 976, *supra*, and *MacBeth-Evans Glass Co.* v. *Smith Glass Co.*, 23 Fed. 2nd, 459 *supra.*)

Petitioner, having elected to take profits, must take them as they actually exist, and what amount, if any, petitioner may hereafter be required to pay, or might have heretofore been required to pay if he had received the profits when earned, and whether such amounts are more or less than respondent actually paid, are clearly matters as to which petitioner deliberately took all risks in seeking respondent's profits.

As a matter of fact, the 13½% tax which petitioner claims it may have to pay (under the present law) when it receives payment of a final judgment will, even on the basis of respondent's own calculations (petition, p. 55), be $713,007.26 less than petitioner would have had to pay if it had received the profits when earned. Thus, unless respondent be credited with the amount it paid for the Federal taxes, not only will it have to pay petitioner a sum in excess

of the profits, but petitioner will have not only the profits but also at least $713,007.26 in addition thereto. Such a result would clearly be inequitable.

Under the record in this case the court must treat the case as one in which the amount paid by the guilty defendant for federal taxes was not in excess of the amount which the injured party would have been required to pay if he had received the infringing profits as and when earned. Respondent offered but was not allowed to prove the amount of federal taxes which petitioner would have been required to pay if respondent's infringing profits had been paid over to petitioner as and when earned, and that the amount of such taxes would have been at least equal to those paid by respondent (R. VI, pages 2507-8 2462-4; 2468-9). This rejected evidence must be assumed to be true, under the decisions in *Scotland* v. *Hill,* 112 U. S. 183, 186, and *Platte Valley Co.* v. *Bosserman,* 202 Federal 692 (8 C. C. A.).

Petitioner also insists, (br. p. 9), that if it had received the profits as earned "there can be no doubt that relief would have been granted" to petitioner under Sections 327 and 328 of the Revenue Act of 1918, 40 Stat. L. 1057, and that petitioner would have received "special assessment".

If we assume (which we do not) that those sections would have been available to petitioner, it would be entirely immaterial for the sufficient reason that petitioner is not seeking relief for damages resulting from the infringement, but has elected to take respondent's net profits, as such, and, as we have already shown, they must be ascertained by deduct-

ing all expenses, regardless of what petitioner must do after it receives the profits.

However, the assumption that petitioner might have had its taxes fixed under Sections 327 and 328 by basing them on the same percentage as that paid by representative corporations engaged in similar business, is wholly speculative. There is absolutely no showing in the record that the conditions existed which, under Section 327, were essential to entitle petitioner to have its 1918 taxes computed under Section 328. There is nothing in the record to indicate what petitioner's income was from its own business, or what its invested capital was, and these are material factors in the calculation of these taxes; nor is there anything in the record to show that if petitioner's taxes were compared with the average tax of representative corporations engaged in a similar business, its tax would have been out of line, or would have worked an exceptional hardship upon petitioner. The alleged difficulty in determining the amount of taxes which petitioner would have had to pay, if it were otherwise material, is merely a chimera which would readily disappear upon ascertaining the actual facts.

Furthermore, Sections 327 and 328 were not even in force prior to 1918 and, in the two years of 1916 and 1917 alone, petitioner admits that it would have been required to pay Federal taxes aggregating $402,-861.70. (See Touche, Niven & Co.'s Report, p. 55, of Petition for Certiorari.)*

* Such of Touche, Niven & Co.'s suggestions as are not repeated in petitioner's brief filed herein on April 7, 1928, will be found answered at pp. 55-59 of respondent's brief filed in opposition to the petition.

The Court of Appeals disposed of this entire question when it held that "if it appears that the amount decreed is only what is left after reimbursement to Wrigley (respondent) of the federal tax already paid thereon, it is unthinkable that collection of the same tax from Larson (petitioner) would be again undertaken."

The Court of Appeals further said:

> "Moreover, the very theory on which Larson may recover these net profits from Wrigley is that Wrigley, in handling the infringing 'Doublemint' gum packages, did so as Larson's trustee or agent—albeit, *ex maleficio.* * * * If an agent conducting business for an absent principal, pays such tax on the profits, should the principal be required to pay another such tax if and when he collects the balance due him from the agent? Surely this ought not to be."

Indeed, petitioner, itself, claims (petition p. 7) and frequently says in its brief, that "it (respondent) must be treated as Larson's agent, selling Larson's gum, and as such liable to account to Larson for all Doublemint gum, wherever sold", and that respondent "was the agent of Larson Company," and that petitioner was the "principal." (Br. p. 20).

Thus, under petitioner's own contention, petitioner will not again have to pay any additional taxes.

Article 344 of Treasury Regulations 69 relating to the 1926 Act provides that:

> "Where the tax has been paid on the net income of an estate or trust by the fiduciary, the

net income on which the tax is paid is free from tax when distributed to the beneficiaries."*

Petitioner does not discuss respondent's right to deduct the taxes on the ground of agency; but attaches so much importance to the reasons which the Master gave for disallowing the taxes that it appends to its petition that portion of the Master's report which deals with this subject.

The Master's report was repudiated in greater part by both the District Court and the Court of Appeals, and when the Master referred to "the amount that will be refunded to Wrigley" and to respondent's right to obtain "relief from the government, and if necessary, courts of equity are open for that purpose," the Master clearly misapprehended the relief available to respondent. The Master evidently thought that respondent could procure a refund from the government, or otherwise protect itself, but, as we have seen, no such right exists. The Master was evidently also largely influenced in his decision by the thought that under the opinions of the Court of Appeals theretofore rendered he was to ascertain profits in this case in some manner different than in any other case, a notion which has been expressly repudiated by the District Court and the Court of Appeals.

The District Court, in refusing to allow respondent credit for these taxes, said "it is equitable" that re-

*To the same effect, see:

Treasury Rulings I. T. 1344, Cumulative Bulletin I-1, p. 217; I. T. 1772 Cumulative Bulletin II-2, p. 113; Article 344 of Treasury Regulations 45 relating to the Revenue Act of 1918; Article 344 of Treasury Regulations 62 relating to the 1921 Act; Article 344 of Treasury Regulations 65 relating to the 1924 Act.

spondent "be left in the position in which it has placed itself by its own act in reporting the profits on Doublemint as its profits, and in settling with the United States on that basis." (R. VII, p. 3)5). As respondent was compelled to report all its profits and to pay taxes accordingly, and could not deduct the possible amount for which it might have to account to petitioner from any of the returns which it has filed with the government, we confess our inability to understand how the facts relied on by the District Court can have the slightest bearing upon the right of respondent to deduct the amount which it was forced to pay the Government when subsequently called on by its principal, or by a third party to account for its net profits.

III.

Respondent Should Be Allowed to Deduct the Amount of Federal Taxes Which It Actually Paid on the Infringing Profits.

This brings us to the question of the amount of Federal taxes which respondent actually paid, and for which, we submit, it is clearly entitled to credit.

Petitioner's brief significantly wholly ignores this question. As we have already shown, the Court of Appeals did not undertake to fix the amount which respondent paid for these taxes, but expressly held that the amount "should be ascertained under the direction of the District Court."

The Court of Appeals held that the amount to be deducted for this item should not exceed

the amount which the District Court should find petitioner would have been required to pay if it had received the profits as earned. And, we submit, the court erred in so limiting the deductible amount, since, as we have already shown, we are concerned only with ascertaining respondent's net profits and not at all with the amount which petitioner might have been required to pay if the profits had been received by it as earned.

The statement in the petition (p. 23) that respondent claimed only $372,942.09 as a deduction for Federal taxes is, as we have shown, a misstatement, and is without the slightest support in the evidence. Respondent has always insisted upon and sought a deduction for the full and exact amount of the Federal taxes which it actually paid. In its first account (filed in December, 1918), respondent deducted $563,933.89 for this item and expressly stated in the account that the amount was "estimated" only. The 1918 taxes were not yet ascertainable because the Revenue Act of 1918 did not become a law until February 24, 1919. (See foot-notes to Wrigley's Account, R. VI, 2771-2; 2783, 2786, 2803). Besides, in that account the highest 1917 tax rate, viz.: 60%, was used in computing 1918 taxes, for which latter year, however, the law fixed the rate at 65%. After making all proper mathematical corrections the amount deductible for that item was found to be $621,108.97, and that amount was deducted in the final revised account which respondent filed (R. VIII, 3709-11, VI, 2577-2579, 2783).

Inasmuch as the Court of Appeals has fixed respondent's profits at a far greater amount than

those shown in respondent's filed accounts, it necessarily follows that the amount of Federal taxes which respondent in fact paid largely exceeds the amount deducted in the filed accounts. Obviously, the exact amount of the tax paid on infringing profits could not be ascertained prior to a judicial determination of the exact amount of profits to be accounted for by respondent.

In 1920, which was after the accounting period, respondent sought a rebate from the Government on account of overpayment of taxes for the years 1914 to 1918, but the matter had not been passed on by the Government while this case was still before the Master (R. VIII, 3710-11, VI, 2532-3, 2708, 2711-12). Subsequently, however, although it is not a matter of record herein, respondent's counsel advised the court below that the Government had allowed respondent's claim so that the above deduction of $621,108.97 required a reduction to $551,061.35.

The amount, $372,942.09, which petitioner erroneously says was all that respondent sought to deduct, was merely the amount which one of respondent's expert accountants figured would be deductible if respondent's profits were held to be as reported by it,* and if the taxes were allocated according to the decision in the *Sly Mfg. Co.* case, *supra.*, that is, by charging the infringing profits with the same proportion of the total taxes paid as the infringing profits bore to the total profits of respondent's infringing and noninfringing business.

* The increase by the Court of Appeals of the profits reported by respondent was, as the court said, influenced by the correct principles to be appied in allocating the expenditures, such as advertising, etc., and not because of any falsity in the filed accounts. (R. XI, p. 4525, 7.)

In that case the court found objection to placing the infringing profits in either the lowest or in the highest brackets on the theory that by so doing an injustice might be done to one or the other of the parties. In the case at bar the respondent proved, without contradiction, that if the formula adopted in the *Sly* case were to be applied to the amount of the federal taxes paid by respondent as shown in its final revised account, then credit should be given respondent for $372,942.09, which amount would have to be reduced by $49,209.21, leaving a balance of $323,732.88, inasmuch as the Government has now allowed respondent's claim of overpayment of taxes during 1914 to 1918 (R. VIII 3710-11; 3799; VI-2532-3. On the other hand, the amount will now have to be increased because of the increase by the Court of Appeals of the profits reported by respondent, and, when increased accordingly, the amount to which respondent would be entitled on the basis of the *Sly* decision would be $471,381.27.

In the *Sly* case the claim of the defendant was that it should be allowed for the excess of the tax it paid over what it would have paid, had it made no profit out of the infringing article, and the plaintiff answered that under no circumstances should the deduction exceed the amount which would have been payable on the infringing profits "if they had been the only profits" of the *whole* business.

No suggestion was made or considered by the court in the *Sly* case as to the propriety of fixing the amount of the deductible federal taxes by ascertaining what the taxes would have been if the allocable portion of the whole business devoted to the infringing manufacture and sale had been the only *business*

and had not been commingled with non-infringing business, and if the infringing profits had been the only profits. In the case at bar, however, in order that the court could be fully informed, respondent introduced evidence as to the amount of invested capital actually and necessarily used in connection with the infringing business and also proved that if the infringing manufacture and sale had been the only business carried on by respondent and if the infringing profits shown in the filed account had been the only profits earned by respondent during the accounting period, then the taxes thereon (after making due allowance for Doublemint's share of the invested capital) would have been at least $427,737.51. (R. IX-3852; VI, 2688-91; V, 1976-7; 2429-30; Wrigley Exhibit 92, Benington 20).

After making the changes necessitated by the Court of Appeals' increase of respondent's reported profits, and making due allowance for Doublemint's share of the invested capital, the amount of federal taxes which respondent would have been required to pay if the infringing business had been respondent's only business, would have been $751,539.58.

Respondent treated Doublemint's profits in its filed accounts as falling in the highest bracket, and, we submit, that this record justifies such treatment inasmuch as the record shows, without contradiction, that respondent's profits were already in the highest bracket without including Doublemint profits. (R. VI, 2579-80)

One of the witnesses for respondent explained the propriety of putting Doublemint's profits in the highest bracket by saying that before beginning to

sell Doublemint, respondent had already built up its business, which was making profits of such magnitude as to reach the highest bracket, and that as Doublemint was the latest business the Doublemint profits were merely added thereto. (R. V, 2579-80.)

The theory of an accounting for profits in an infringement case is that the infringer shall not profit from his own wrong. Such being the case, it must necessarily follow that since respondent's profits already reached the highest bracket without taking into consideration the Doublemint profits, the only benefit which respondent can conceivably have had from this infringement is the difference between the net profits on Doublemint after 60% in 1917 and 65% in 1918 have first been deducted for federal taxes.

When the changes necessitated by treating the profits as fixed by the Court of Appeals are made, respondent will be entitled to a credit of $913,431.56, if the infringing profits are treated as the last earned and are therefore placed in the highest bracket.

In refusing to permit the defendant in the *Sly* case to fix the amount of deductible taxes on the basis that the infringing profits should be allocated to the highest bracket, and to support his adoption of the proportional method, Judge Rose referred to the possible case of a defendant whose sole business consisted of the infringement of three distinct and separately owned patents, and he said that to apply the method suggested by the defendant in the case before him might give the infringer credit for a larger amount of taxes than he actually paid. If such a case as Judge Rose supposed should ever arise, it may well be that the formula adopted by

him would do exact justice between the litigants, but it is sufficient here to say that no such case is presented to this Court by this record.

From the foregoing the court will observe that the decree herein will amount to about $400,000 if Doublemint's profits are placed in the highest bracket. Petitioner's effort has been to belittle a decree for such an amount although it is four times the amount of petitioner's claimed capital (br. p. 9) and although petitioner has offered no proof of any damages. The record also shows that respondent offered, but was not allowed to prove that petitioner entered into a contract to sell its entire output for a period of five years from the summer of 1914 (which covers the entire accounting period), at prices aggregating the sum of $729,820. (R. IX, 3997; 4000; VI, 2472-5; II, 1018). The fact is that a decree in petitioner's favor places it in a better condition by reason of the infringement than it would have been had there been no infringement; and the Court of Appeals was abundantly justified by the record in holding that the award made by it is "palpably and unquestionably ample to fully compensate Larson for any and all invasion of its rights".

Aside from the misstatements contained in its petition and hereinbefore referred to that the Court of Appeals allowed respondent a credit of $888,276.52 and that such credit was over $500,000 more than respondent claimed in its filed account, petitioner has entirely ignored the question as to the amount of the credit to which respondent is entitled for these federal taxes and is content in its brief to rest its whole case upon the proposition that they are not deductible at all. Having, we believe, clearly demon-

strated that the ascertainment of respondent's net profits requires the deduction of the amount actually expended by it for these taxes, the decree of the Circuit Court of Appeals, we submit, should be affirmed, on the pending petition, insofar as the Court of Appeals held that respondent is entitled to credit for the taxes actually paid on the infringing profits, but should be modified so that the amount to be deducted should be that which the District Court may find was actually expended by respondent for such taxes without reference to any amount which petitioner might have been required to pay if the profits had been turned over to it as earned. Petitioner will be fully and sufficiently protected by a provision in the decree directing respondent to furnish a suitable bond conditioned to reimburse petitioner for such Federal taxes as respondent may hereafter save because of its payment of any final decree which may be entered herein.

Respectfully submitted,

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WALLACE R. LANE,